

Supreme Court of the United States

OCTOBER TERM, 1965

No. 65

UNITED STATES, APPELLANT,

vs.

HERBERT GUEST, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

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**IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION**

No. 2232

Violation: 18 U.S.C. 241

UNITED STATES OF AMERICA

v.

HERBERT GUEST
JAMES SPERGEON LACKEY
CECIL WILLIAM MYERS
DENVER WILLIS PHILLIPS
JOSEPH HOWARD SIMS
GEORGE HAMPTON TURNER

INDICTMENT filed October 16, 1964

THE GRAND JURY CHARGES:

Commencing on or about January 1, 1964, and continuing to the date of this indictment, HERBERT GUEST, JAMES SPERGEON LACKEY, CECIL WILLIAM MYERS, DENVER WILLIS PHILLIPS, JOSEPH HOWARD SIMS, and GEORGE HAMPTON TURNER, did, within the Middle District of Georgia, Athens Division, conspire together, with each other, and with other persons to the Grand Jury unknown, to injure, oppress, threaten, and intimidate Negro citizens of the United States in the vicinity of Athens, Georgia, in the free exercise and enjoyment by said Negro citizens of the following rights and privileges secured to them by the Constitution and laws of the United States:

1. The right to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of motion picture theaters, restaurants, and other places of public accomodation.

2. The right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof;

[fol. 3] 3. The right to the full and equal use on the same terms as white citizens of the public streets and highways in the vicinity of Athens, Georgia;

4. The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia;

5. Other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia.

It was a part of the plan and purpose of the conspiracy that its objects be achieved by various means, including the following:

1. By shooting Negroes;
2. By beating Negroes;
3. By killing Negroes;
4. By damaging and destroying property of Negroes;
5. By pursuing Negroes in automobiles and threatening them with guns;
6. By making telephone calls to Negroes to threaten their lives, property, and persons, and by making such threats in person;
7. By going in disguise on the highway and on the premises of other persons;
8. By causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts; and
9. By burning crosses at night in public view.

All in violation of Section 241, Title 18, United States Code.

A TRUE BILL.

/s/ Illegible

Foreman on the Grand Jury

/s/ Floyd M. Buford
United States Attorney

[fol. 4]

PLEA

I, Herbert Guest having been advised of my Constitutional rights, and having had the charges herein stated to me, plead not guilty In Open Court, this 30th day of November, 1964.

/s/ Jim Hudson

PLEA

I, James Spergeon Lackey having been advised of my Constitutional right, and having had the charges herein stated to me, plead In Open Court, this day of, 19....

.....

[File Endorsement Omitted]

PLEA

I, Cecil William Myers having been advised of my Constitutional rights, and having had the charges herein stated to me, plead not guilty In Open Court, this 30th day of November, 1964.

/s/ Jim Hudson

PLEA

I, Denver Willis Phillips having been advised of my Constitutional rights, and having had the charges herein stated to me, plead not guilty In Open Court, this 30th day of November, 1964.

/s/ Jim Hudson

PLEA

I, Joseph Howard Sims having been advised of my Constitutional rights, and having had the charges herein stated to me, plead not guilty In Open Court, this 30th day of November, 1964.

/s/ Jim Hudson

PLEA

I, George Hampton Turner having been advised of my Constitutional rights, and having had the charges herein stated to me, plead not guilty In Open Court, this 30th day of November, 1964.

/s/ Jim Hudson

* * * *

[fol. 5]

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

[File Endorsement Omitted]

No. 2232

UNITED STATES OF AMERICA

VS

GEORGE HAMPTON TURNER, ET AL

DEFENDANT TURNER'S MOTION FOR BILL OF PARTICULARS
—filed October 23, 1964

COMES NOW George Hampton Turner, one of the defendants in the foregoing case and moves that the Court for cause direct the filing of a Bill of Particulars so that this defendant may be more specifically informed as to the nature of the charge against him, so that surprise will be prevented, so that he will be able to prepare for trial, and so that he might be safeguarded from the subsequent prosecution for the same act. Your defendant shows that the Bill of Particulars should set out the following:

1.

The times and places defendant or his alleged co-conspirators did shoot at Negroes and what Negro or Negroes

they shot at. It should also set out if the defendant shot at the Negroes or if his alleged co-conspirators shot at the Negroes and if a co-conspirator, which one or ones.

2.

The times and places defendant or his co-conspirators did beat Negroes and what Negroes defendant or his co-conspirators did beat, and if a co-conspirator, which one.

[fol. 6]

3.

The times and places defendant or his alleged co-conspirators did kill Negroes, what Negroes were killed, and who killed them, the defendant or his co-conspirators, and if his co-conspirators which one or ones.

4.

The times and places defendant or his alleged co-conspirators did damage and destroy property of Negroes and the name of the Negroes whose property was damaged or destroyed, and if destroyed by the defendant, or his alleged co-conspirators, and if by defendant's co-conspirators, which one or ones.

5.

The times and places defendant or his alleged co-conspirators did pursue Negroes in automobiles and threaten them with guns, and the names of the Negroes involved, and whether or not they were pursued by this defendant and threatened by this defendant or were pursued and threatened by defendant's alleged co-conspirators, and if by the alleged co-conspirators, which one.

6.

The times and places defendant or his co-conspirators did threaten Negroes by means of a telephone call and by making threats in person, and the names of the Negroes to whom the threats were made, and if made by [fol. 7] the defendant or his alleged co-conspirators, and if by the co-conspirators, which one.

7.

The times and places the defendant or his alleged co-conspirators did go in disguise upon the highway or on the premises of other persons, and the names of the premises of other persons defendant or his alleged co-conspirators did go upon, and if his co-conspirators, which one.

8.

The time and place the defendant or his alleged co-conspirators did cause the arrest of Negroes by means of false reports, and the names of such Negroes, and whether or not the arrest was caused by this defendant or his alleged co-conspirators, and if by his alleged co-conspirators, which one.

9.

The times and places this defendant, or his alleged co-conspirators did burn crosses at night in public view, and whether or not the crosses were burned by this defendant or his co-conspirators, and if by his co-conspirators, which one.

WHEREFORE, your defendant prays that a rule nisi issue requiring the United States District Attorney for the Middle District of Georgia to show cause, if any he [fol. 8] can, why he should not be required to file such a Bill of Particulars, and that upon a hearing the Court order such Bill of Particulars to be filed.

/s/ Jim Hudson
Attorney for GEORGE HAMPTON
TURNER

[Certificate of Service (omitted in printing)]

[fol. 9]

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

[File Endorsement Omitted]

No. 2232

UNITED STATES OF AMERICA

vs

HERBERT GUEST, ET AL

DEFENDANT GUEST'S MOTION FOR BILL OF PARTICULARS—
filed October 23, 1964

COMES NOW Herbert Guest, one of the defendants in the foregoing case and moves that the Court for cause direct the filing of a Bill of Particulars so that this defendant may be more specifically informed as to the nature of the charge against him, so that surprise will be prevented, so that he will be able to prepare for trial, and so that he might be safeguarded from the subsequent prosecution for the same act. Your defendant shows that the Bill of Particulars should set out the following:

1.

The times and places defendant or his alleged co-conspirators did shot at Negroes and what Negro or Negroes they shot at. It should also set out if the defendant shot at the Negroes or if his alleged co-conspirators shot at the Negroes and if a co-conspirator, which one or ones.

2.

The times and places defendant or his co-conspirators did beat Negroes and what Negroes defendant or his co-[fol. 10] conspirators did beat, and if a co-conspirator, which one.

3.

The times and places defendant or his alleged co-conspirators did kill Negroes, what Negroes were killed, and who killed them, the defendant or his co-conspirators, and if his co-conspirators which one or ones.

4.

The times and places defendant or his alleged co-conspirators did damage and destroy property of Negroes and the name of the Negroes whose property was damaged or destroyed, and if destroyed by the defendant, or his alleged co-conspirators, and if by defendant's co-conspirators, which one or ones.

5.

The times and places defendant or his alleged co-conspirators did pursue Negroes in automobiles and threaten them with guns, and the names of the Negroes involved, and whether or not they were pursued by this defendant and threatened by this defendant or were pursued and threatened by defendant's alleged co-conspirators, and if by the alleged co-conspirators, which one.

6.

The times and places defendant or his co-conspirators did threaten Negroes by means of a telephone call and by making threats in person, and the names of the Negroes to whom the threats were made, and if made by [fol. 11] the defendant or his alleged co-conspirators, and if by the co-conspirators, which one.

7.

The times and places the defendant or his alleged co-conspirators did go in disguise upon the highway or on the premises of other persons, and the names of the premises of other persons defendant or his alleged co-conspirators did go upon, and if his co-conspirators, which one.

8.

The time and place the defendant or his alleged co-conspirators did cause the arrest of Negroes by means of false reports, and the names of such Negroes, and whether or not the arrest was caused by this defendant or his alleged co-conspirators, and if by his alleged co-conspirators, which one.

9.

The times and places this defendant, or his alleged co-conspirators did burn crosses at night in public view, and whether or not the crosses were burned by this defendant or his co-conspirators, and if by his co-conspirators, which one.

WHEREFORE, your defendant prays that a rule nisi issue requiring the United States District Attorney for the Middle District of Georgia to show cause, if any he [fol. 12] can, why he should not be required to file such a Bill of Particulars, and that upon a hearing the Court order such Bill of Particulars to be filed.

/s/ Jim Hudson
Attorney for HERBERT GUEST

[Certificate of Service (omitted in printing)]

[fol. 13]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

[File Endorsement Omitted]

No. 2232

UNITED STATES OF AMERICA

v.

JAMES SPERGEON LACKEY, ET AL

DEFENDANT LACKEY'S MOTION TO STRIKE SURPLUSAGE—
filed November 12, 1964

Comes now the above named defendant, by and through his counsel of record, and moves the Court to strike from the above captioned indictment the portion thereof specified below, showing as grounds therefor the grounds stated below:

1.

Defendant moves to strike the language contained in paragraph numbered 1 of the indictment, that is, "The right to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of motion picture theaters, restaurants, and other places of public accommodation," for the reason that said language is surplusage, not material to the indictment and highly prejudicial to defendant, in that:

(a) It does not specify, define or otherwise allege a right or privilege secured citizens by the Constitution or laws of the United States;

(b) It is too vague and indefinite to form any part of the offense sought to be charged.

[fol. 14]

2.

Defendant moves to strike the language contained in paragraph numbered 2 of the indictment, that is, "The

right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof," for the reason that said language is surplusage, not material to the indictment and highly prejudicial to the defendant, in that:

(a) It does not specify, define or otherwise allege a right or privilege secured citizens by the Constitution or laws of the United States;

(b) It is too vague and indefinite to form any part of the offense sought to be charged;

(c) It attempts to designate public facilities in the alternative, referring to facilities owned, operated or managed by or on behalf of the State or any subdivision and is, therefore, duplicitous.

3.

Defendant moves to strike the language contained in paragraph numbered 3 of the indictment, that is, "The right to the full and equal use on the same terms as white citizens of the public streets and highways in the vicinity of Athens, Georgia," for the reason that said language is surplusage, not material to the indictment and highly prejudicial to defendant, in that:

[fol. 15] (a) It does not specify, define or otherwise allege a right or privilege secured citizens by the Constitutional or laws of the United States;

(b) It is too vague and indefinite to form any part of the offense sought to be charged.

4.

Defendant moves to strike the language contained in paragraph numbered 4 of the indictment, that is, "The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia," for the reason that said language is surplusage, not material to the indictment and highly prejudicial to defendant, in that:

(a) It does not specify, define or otherwise allege a right or privilege secured citizens by the Construction or laws of the United States;

(b) It is too vague and indefinite to form any part of the offense sought to be charged.

5.

Defendant moves to strike the language contained in paragraph numbered 5 of the indictment, that is, "Other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia," for the reason that said language is surplusage, not material to the indictment and highly prejudicial to defendant, in that:

(a) It does not specify, define or otherwise allege [fol. 16] a right or privilege secured citizens by the Constitution or laws of the United States;

(b) It is too vague and indefinite to form any part of the offense sought to be charged.

WHEREFORE, defendant prays that this his motion be granted and that the language specified be struck from the indictment as surplusage.

/s/ Nickolas P. Chilivis

/s/ Robert B. Thompson

Attorneys for JAMES SPERGEON LACKEY

[fol. 17]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

[File Endorsement Omitted]

No. 2232

UNITED STATES OF AMERICA

v.

JAMES SPERGEON LACKEY, ET AL

DEFENDANT LACKEY'S MOTION TO DISMISS INDICTMENT—
filed November 12, 1964

Comes now JAMES SPERGEON LACKEY, one of the defendants named in the captioned indictment, and moves the Court to dismiss the indictment on the grounds that the same does not charge an offense under the laws of the United States.

/s/ Nickolas P. Chilivis

/s/ Robert B. Thompson
Attorneys for JAMES SPERGEON LACKEY

[fol. 18]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

[File Endorsement Omitted]

INDICTMENT No. 2232

UNITED STATES OF AMERICA

v.

JAMES SPERGEON LACKEY, ET AL

DEFENDANT LACKEY'S MOTION FOR SPEEDY TRIAL—
filed November 12, 1964

Comes now JAMES SPERGEON LACKEY, one of the defendants in the captioned indictment, by and through his attorney of record, and files this his demand for a speedy trial. Movant shows that he was indicted by the Federal Grand Jury for the United States District Court, Middle District of Georgia, in October 1964, and that the regular term of court in the Athens Division of said district convenes in December 1964. Movant demands that he be granted speedy trial and that he be tried at the regular term of court in the Athens Division in December 1964.

/s/ Nickolas P. Chilivis

/s/ Robert B. Thompson
Attorneys for JAMES SPERGEON LACKEY

[fol. 19]

[Certificate of Service (omitted in printing)]

[fol. 20]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

[File Endorsement Omitted]

NUMBER 2232

UNITED STATES OF AMERICA

VS

HERBERT GUEST, ET AL

MOTION TO STRIKE SURPLUSAGE—filed November 18, 1964

COMES NOW Herbert Guest, Cecil Myers, Denver Phillips, Howard Sims, and George Hampton Turner, defendants in the above captioned matter and move that the Court strike from the indictment the portion thereof specified below, showing as grounds therefor the ground stated below:

1.

Defendants move to strike the language contained in paragraph number 1 of the indictment, that is, "The right to the full and equal enjoyment of the goods, serves, facilities, privileges, advantages, and accomodations of motion picture theatres, restaurants, and other places of public accomodation," for the reason that said language is surplusage, not material to the indictment and highly prejudicial to defendant, in that:

(a) It does not specify, define or other wise allege a right or privilege secured citizens by the Constitution or laws of the United States;

(b) It is too vague and indefinite to form any part of the offense sought to be charged.

[fol. 21]

2.

Defendants move to strike the language contained in paragraph number 2 of the indictment, that is, "The right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof," for the reason that said language is surplusage, not material to the indictment and highly prejudicial to the defendants, in that:

(a) It does not specify, define or otherwise allege a right or privilege secured citizens by the Constitution or laws of the United States;

(b) It is too vague and indefinite to form any part of the offense sought to be charged;

(c) It attempts to designate public facilities in the alternative, referring to facilities owned, operated *or* managed by *or* on behalf of the State *or* any subdivision and is, therefore, duplicitous.

3.

Defendants move to strike the language contained in paragraph numbered 3 of the indictment, that is, "The right to the full and equal use on the same terms as white citizens of the public streets and highways in the vicinity of Athens, Georgia," for the reason that said language is surplusage, not material to the indictment and highly prejudicial to defendant, in that:

[fol. 22] (a) It does not specify, define or otherwise allege a right or privilege secured citizens by the Constitution or laws of the United States;

(b) It is too vague and indefinite to form any part of the offense sought to be charged.

4.

Defendants move to strike the language contained in paragraph numbered 4 of the indictment, that is, "The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities

of interstate commerce within the State of Georgia," for the reason that said language is surplusage, not material to the indictment and highly prejudicial to defendants, in that:

(a) It does not specify, define or otherwise allege a right or privilege secured citizens by the Constitution or laws of the United States;

(b) It is too vague and indefinite to form any part of the offense sought to be charged.

5.

Defendants move to strike the language contained in paragraph numbered 5 of the indictment, that is, "Other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia," for the reason that said language is surplusage, not material to the indictment and highly prejudicial to defendants, in that:

[fol. 23] (a) It does not specify, define or otherwise allege a right or privilege secured citizens by the Constitution or laws of the United States;

(b) It is too vague and indefinite to form any part of the offense sought to be charged.

WHEREFORE, defendants pray that this their motion be granted and that the language specified be struck from the indictment as surplusage.

/s/ Jim Hudson
Attorney for Defendants

[Certificate of Service (omitted in printing)]

[fol. 24]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

[File Endorsement Omitted]

NUMBER 2232

Violation of 18 U.S.C. 241

UNITED STATES OF AMERICA

vs

HERBERT GUEST, ET AL

MOTION TO DISMISS INDICTMENT—filed November 18, 1964

COMES NOW Herbert Guest, Cecil Myers, Denver Phillips, Howard Sims, and George Hampton Turner, defendants in the above captioned indictment, and move that the Court dismiss the indictment on the ground that the same does not charge an offense under the Laws of the United States.

/s/ Jim Hudson
Attorney for Defendants

[Certificate of Service (omitted in printing)]

[fol. 25]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

[File Endorsement Omitted]

Criminal No. 2232

UNITED STATES OF AMERICA

v.

HERBERT GUEST, JAMES SPERGEON LACKEY, CECIL WILLIAM MYERS, DENVER WILLIS PHILLIPS, JOSEPH HOWARD SIMS, GEORGE HAMPTON TURNER

OPINION—December 29, 1964

BOOTLE, District Judge:

For decision now are the defendants' motions to quash the indictment on the ground that it does not charge an offense under the laws of the United States. A statement of the question thus raised necessitates reference to some significant historical facts and a careful consideration of a few important Constitutional principles.

First, it must be noted that our Federal Government is a Government of limited powers, limited in number though not in degree. It can pinpoint its birth on the calendar. There was the ineffectual attempt under the Articles of Confederation. Then, there was the gloriously successful genesis under the Constitution. While the Federal Government is supreme in its sphere, its sphere is circumscribed. Its every power stems from a written instrument, the Constitution, or does not exist. It is that Constitution and the laws made in pursuance thereof that constitute the supreme law of the land.

Secondly, it must be remembered that federal courts are courts of limited jurisdiction. This necessarily follows from the fact that the Federal Government, under which these courts are created, is a Government of lim-

[fol. 26] ited powers. The federal courts have only such powers, only such jurisdiction as is conferred upon them by valid acts of Congress. There is no such thing as federal common law criminal jurisdiction. When a prosecution is brought against any person in a federal court, that person is entitled to ask under what valid act of Congress he is charged. The defendants so inquire by these motions to dismiss.

Thirdly, we should remember that any statute seeking to proscribe human conduct, making criminal that which but for the statute would be unpunishable in the court where such statute is sought to be enforced, must specifically describe the conduct denounced. This is elementary in the concept of due process of law, a principle applicable to the Federal Government under the Fifth Amendment, as well as to the States under the Fourteenth.

What is being said here is not new. On many occasions courts have measured indictments like this one¹

¹ The indictment reads:

"THE GRAND JURY CHARGES:

"Commencing on or about January 1, 1964, and continuing to the date of this indictment, HERBERT GUEST, JAMES SPERGEON LACKEY, CECIL WILLIAM MYERS, DENVER WILLIS PHILLIPS, JOSEPH HOWARD SIMS, and GEORGE HAMPTON TURNER, did, within the Middle District of Georgia, Athens Division, conspire together, with each other, and with other persons to the Grand Jury unknown, to injure, oppress, threaten, and intimidate Negro citizens of the United States in the vicinity of Athens, Georgia, in the free exercise and enjoyment by said Negro citizens of the following rights and privileges secured to them by the Constitution and the laws of the United States:

"1. The right to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of motion picture theaters, restaurants, and other places of public accommodation.

"2. The right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof;

"3. The right to the full and equal use on the same terms as white citizens of the public streets and highways in the vicinity of Athens, Georgia;

"4. The right to travel freely to and from the State of Georgia

[fol. 27] against the principles above mentioned. There has not been found any authoritative decision which this court can construe as going so far as to hold this indictment valid.² On the contrary, both of the two courts whose decisions are binding upon this court have fairly recently rendered decisions which this court construes as clearly invalidating this indictment.

The statute upon which the Government relies originated as Section 6 of the Act of May 31, 1870, 16 Stat. 140. It subsequently and successively became known as [fol. 28] Section 5508 of the Revised Statutes of 1874-1878, Section 19 of the Criminal Code of 1909, and 18 U. S. C. A. § 51, 1926 edition, and is presently 18 U.S.C.A. § 241, 1948 edition, which reads as follows:

"Conspiracy against rights of citizens.

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United

and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia;

"5. Other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia.

"It was a part of the plan and purpose of the conspiracy that its objects be achieved by various means, including the following:

"1. By shooting Negroes;

"2. By beating Negroes;

"3. By killing Negroes;

"4. By damaging and destroying property of Negroes;

"5. By pursuing Negroes in automobiles and threatening them with guns;

"6. By making telephone calls to Negroes to threaten their lives, property, and persons, and my making such threats in person;

"7. By going in disguise on the highway and on the premises of other persons;

"8. By causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts; and

"9. By burning crosses at night in public view.

"All in violation of Section 241, Title 18, United States Code."

² The few early decisions to the contrary are rejected by the Supreme Court in footnote 8 in *United States v. Williams*, 341 U. S. 70, 81.

States, or because of his having so exercised the same; or

"If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

"They shall be fined not more than \$5,000 or imprisoned not more than ten years, or both."

Now nearly ninety five years old, this statute has been construed by the courts on several occasions. We now have it upon the authority of the court of appeals for the Fifth Circuit, and upon the authority of the Supreme Court that this statute was never intended by the Congress to embrace, and therefore does not embrace, the Fourteenth Amendment rights. *Williams v. United States*, 179 F. 2d 644 (5th Cir. 1950); *Powe v. United States*, 109 F. 2d 147 (5th Cir. 1940); *United States v. Williams*, 341 U. S. 70, 95 L. ed 758 (1951). The precise holding of the court of appeals on this point in the *Williams* case in a clear, analytical and forceful opinion by Judge Sibley, concurred in by Judge Waller, Judge Holmes dissenting, was:

"In the conspiracy provision [section 241] the Congress had in mind the federal rights and privileges which appertain to citizens as such and not the general rights extended to all persons by the clause of the Fourteenth Amendment. The *citizen's* rights are *specifically* stated in the Constitution and statutes, and in them may be found a standard of conduct. Such was the case in *United States v. Classic*, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368, when the right of the citizen to vote for a Congressman was involved. Ex parte Yarbrough, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274, like the *Classic* case, involved the right of a citizen to vote; the Fifteenth and not the Fourteenth Amendment was rested upon. We are of the opinion that this provision of Sec. 19 [section 241] was not intended to include rights under the due process clause of the Fourteenth Amendment [fol. 29] cured not to citizens only, but to everyone."

That holding of the court of appeals was affirmed by the Supreme Court in an equally clear and convincing opinion by Mr. Justice Frankfurter, who wrote,

"we agree that § 241 . . . does not reach the conduct laid as an offense in the prosecution here. This is not because we deny the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment; nor is it because we fully accept the course of reasoning of the court below. We base our decision on the history of § 241, its text and context, the statutory framework in which it stands, its practical and judicial application—controlling elements in construing a federal criminal provision that affects the wise adjustment between State responsibility and national control of essentially local affairs. The elements all converge in one direction. They lead us to hold that § 241 only covers conduct which interferes with rights arising from the substantive powers of the Federal Government."

In the *Williams* case both the court of appeals and Supreme Court made a detailed study of § 241 and also of its companion statute, § 242, which consecutively has been section 2 of the Act of April 9, 1866, 14 Stat. 27, section 17 of the Act of May 31, 1870, 16 Stat. 144, section 5510 of the Revised Statutes of 1874-1878, section 20 of the Criminal Code of 1909, 35 Stat. 1092, 18 U.S.C.A. § 52, 1925 edition, and now 18 U.S.C.A. § 242, 1948 edition. Attached to the opinion of the Supreme Court is a comparative table showing the successive phraseology of these two statutes.

The differences in these two Code sections are succinctly pointed out by Judge Sibley, at page 647, as follows:

"Sec. 19 [now 241] differs much from Sec. 20 [now 242], though both have to do with federally secured rights. Sec. 20 [now 242] creates a misdemeanor offense; it speaks of color of law, and of 'inhabitant of any State', and of discrimination in punishment on account of alienage or color or race.

It punishes acts. Sec. 19 [now 241] punishes only conspiracy; it makes no reference to Sec. 20 [now 242], or to color of law, or to State, or to race or [fol. 30] color; it adds also a separate and independent crime, the act of two or more persons going in disguise on the highway or premises of another with the bad intent named; and the punishment is that of felony, and ineligibility to hold office. Wilfulness is not mentioned, nor is 'intent' in the defining of the crime of conspiracy. It does not protect 'inhabitants', but only 'any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States.'"

And the Supreme Court concluded:

"All the evidence points to the same conclusion: that § 241 applies only to interference with rights which arise from the relation of the victim and the Federal Government, and not to interference by State officers with rights which the Federal Government merely guarantees from abridgement by the States." P. 81.

Actually, the court of appeals and the Supreme Court went further in the *Williams* case than we are called upon to go in this case because the indictment in the *Williams* case charged that the defendants acted under color of State law, thus incorporating the sometimes magical words from § 242. Nevertheless, the § 242 one year misdemeanor could not thus be converted into a § 241 ten year felony. The Court said:

"the validity of a conviction under § 241 depends upon the scope of that section, which cannot be expanded by the draftsman of an indictment."

The indictment in the case at bar contains not the slightest suggestion of State action, the color of law ingredient necessary under § 242.³ It would be hard to imagine that

³ There was a series of prosecutions which have become known as "the *Williams* cases". One indictment was under § 241. The conviction under that indictment is the subject matter of *Williams v. United States*, 179 F. 2d 644 (5th Cir. 1950) and *United States*

[fol. 31] Congress intended that these two sections of the same Act of 1870 apply to and cover the same rights because as Judge Sibley wrote:

"It would certainly be strange that in the same Act of 1870 the Congress should punish the *consummated* deprivation of rights by such acts as are here charged only when wilfully done, and only as a misdemeanor [under 242]; but should punish as a ten year felony with deprivation of the power to hold federal office, the bare conspiring to do such a thing though not wilfully, and with nothing more in fact done."

The inclusion of the element of conspiracy in § 241 would hardly account for an increase of nine years in the maximum punishment when we remember that the general offense of conspiracy, until recently, carried only a two year maximum sentence. Nor would the presence of the requirement of State action in § 242 and its absence in

v. Williams, 341 U. S. 70, above cited. The indictment in that case charged in substance that the defendants acting under the laws of the State of Florida conspired to injure a citizen of the United States and of Florida in the free exercise and enjoyment of the rights and privileges secured to him and protected by the Fourteenth Amendment, to-wit, the right not to be deprived of liberty without due process of law; the right to be secure in his person while in the custody of the State of Florida; and to be immune from illegal assault and battery while in the custody of persons acting under color of the laws of Florida by persons exercising the authority of the State of Florida, and the right to be tried and punished, if guilty, by due process of law under the laws of Florida. Three of the defendants, including Williams, were alleged to have, and to have conspired to use, authority under the State of Florida. It was the conviction under that indictment which the court of appeals and Supreme Court set aside for the reasons above stated.

Williams was also convicted under an indictment drawn under § 242, it being established that he acted under color of law and the trial court having applied to § 242 the interpretation, with emphasis upon the word "wilfully", as required by the Supreme Court decision in *Screws v. United States*, 325 U. S. 91, 89 L. ed 1495 (1945). That conviction was dealt with and affirmed in *Williams v. United States*, 179 F. 2d 656 (5th Cir. 1950), and *Williams v. United States*, 341 U. S. 97, 95 L. ed 774 (1951).

A third case dealt with perjury, and is reported as *United States v. Williams*, 93 F. Supp. 922 (S.D. Fla. 1950) and *United States v. Williams*, 341 U. S. 58, 95 L. ed. 747 (1951).

§ 241 reasonably account for the more severe penalty against private defendants and the less severe penalty against those acting under color of law. When Congress enacted the Civil Rights Act of March 1, 1875, entitled "An Act to Protect All Citizens in their Civil and Legal Rights" held unconstitutional in the Civil Rights Cases, 109 U. S. 2, 27 L. ed. 835 (1883), thus undertaking to protect Fourteenth Amendment rights generally, it prescribed as punishment forfeiture of \$500 to the person aggrieved, a fine of not more than \$1,000, and imprisonment [fol. 32] ment ranging from 30 days to one year.

As the Supreme Court pointed out, to construe § 241 as embracing Fourteenth Amendment rights generally rather than the rights of federal citizens as such would be not only a new, but a distorting, construction of an old statute making for redundancy and confusion, and if we assume that the conspiracy is under color of State law it can be reached under § 242 with the aid of the general conspiracy statute. Under the construction of § 241, contended for by the Government in the *Williams* case and in the case at bar, any conduct punishable under § 242 with the aid of the general conspiracy statute would also be punishable under § 241, and any conduct punishable under § 241 would also be punishable under § 242 with the aid of the general conspiracy statute if we add only the element of acting under color of State law, and this notwithstanding the vast difference in the maximum punishments prescribed. Criminal statutes "must be strictly construed." *Prussian v. United States*, 282 U. S. 675, 677, 75 L. ed. 610, 612 (1931). "An ambiguity in such a statute is not to be resolved by an interpretation 'to embrace offenses not clearly within the law.'" *Merrill v. United States*, — F. 2d — (5th Cir. Nov. 24, 1964). See also *Krichman v. United States*, 256 U. S. 363, 367-368, 65 L. ed. 992 (1921). Any doubt must be resolved against broadening the scope of a criminal statute. *United States v. Adielizzio*, 77 F. 2d 841, 844 (7th Cir. 1935).

The Supreme Court, in the *Williams* case, buttressed its decision with an exhaustive review of its prior holdings pointing out that these decisions had established that the rights which § 241 protects from individual action

are those federal rights which arise from the relationship of the individual and the Federal Government, for instance, the right to vote in general elections for Congressmen, *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274 (1884), *Guinn v. United States*, 238 U. S. 347, 59 [fol. 33] L. ed 1340 (1915), *United States v. Mosley*, 238 U. S. 383, 59 L. ed 1355 (1915), *United States v. Saylor*, 322 U. S. 385, 88 L. ed 1341 (1944); the right to vote in Louisiana primary elections for Congressmen, *United States v. Classic*, 313 U. S. 299, 85 L. ed 1368 (1941); the right to establish a claim under the Homestead Acts, this being a right "wholly" dependent upon an Act of Congress, *United States v. Waddell*, 112 U. S. 76, 28 L. ed 673 (1884); the right of citizens in custody of a United States Marshal to be free from assault, *Logan v. United States*, 144 U. S. 263, 36 L. ed 429 (1892), and the right to inform on violations of federal laws, *In Re Quarles*, 158 U. S. 532, 39 L. ed 1080 (1895); *Motes v. United States*, 178 U. S. 458, 44 L. ed 1150 (1900): and pointing out further that rights, albeit federal rights, which do not arise from the relationship of the individual to the Federal Government and which arise only by reason of the Fourteenth Amendment's guaranty of protection against action by or on behalf of the States are not covered by § 242, for instance, *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed 588 (1876), where the defendants under the 4th and 12th counts were charged with having violated § 241, their charged intent being to prevent and hinder citizens of African descent and persons of color in "the free exercise and enjoyment of their several right [sic] and privilege [sic] to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States; and then and there, at that time, being in force in the said State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons being citizens of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens", and where the court said:

[fol. 34] "The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This is the Amendment guaranties [sic] but no more. The power of the National Government is limited to the enforcement of this guaranty."

In the *Williams* case the Supreme Court also relied upon the following cases: *Hodges v. United States*, 203 U. S. 1, 18, 51 L. ed 65 (1906), holding that the United States has no jurisdiction under the Thirteenth Amendment or under § 241 of a charge of conspiracy by individuals not under color of law to prevent citizens of African descent, because of their race and color, from making or carrying out contracts and agreements to labor and that the effect of the War Amendments was to abolish slavery and to make the emancipated slaves citizens, not wards of the nation, the nation "believing that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the States where they should make their homes," and holding further that "they [members of the African race] took no more from the Amendment [13th] than any other citizen of the United States; *United States v. Wheeler*, 254 U.S. 281, 65 L. ed 271 (1920), holding that a conspiracy by individuals not under color of law to deprive citizens of the United States of their right to remain in a particular state by seizing them and deporting them to another state, is not a violation of § 241, and that the privilege of passing from [fol. 35] state to state is not an attribute of national citizenship, but is one of those privileges which belong

by right to the citizens of all free governments, distinguishing on the latter point the earlier cases, *Crandall v. Nevada*, 6 Wall. 35, 18 L. ed 745, and *Twining v. New Jersey*, 211 U.S. 78, 97, 53 L. ed 97, 105; *United States v. Powell*, 212 U. S. 564, 53 L. ed 653, affirming *Per Curiam United States v. Powell*, 151 Fed. 648, holding that participants in a mob which seized a Negro from the custody of a local sheriff and lynched him were not indictable under § 241 (see *United States v. Williams*, 341 U. S. 70, 95 L. ed 758); and *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed 766, holding that a conspiracy to drive *aliens* from their homes is not an offense under § 241, since it is expressly limited to interference with *citizens*.

Of particular interest to this court is the fact pointed out by Mr. Justice Frankfurter in footnote 8 to the *Williams* case that the indictment in the famous case of *Screws v. United States*, 325 U. S. 91, 89 L. ed 1495, which originated in this court, contained three counts, count 1 laying a charge under § 241; count 2, under § 242, and count 3, under § 242 in connection with the general conspiracy statute. Count 1 was very much like the indictment at bar, except that it identified two of its three defendants as state officers and went on to charge that these two officers and the third defendant did conspire to injure and oppress a named Negro citizen of the United States and an inhabitant of the State of Georgia in the free exercise and enjoyment of rights, privileges and immunities secured to said Negro citizen by the Constitution and the laws of the United States, to-wit, the right to be secure in his person and to be immune from illegal assault and battery; the right and privilege not to be deprived of liberty and life without due process of law; the right and privilege not to be denied equal protection of the law; [fol. 36] the right and privilege not to be subjected to different punishments, pains and penalties by reason of his race and color than are prescribed for the punishment of other citizens; the right and privilege to be tried upon the charge for which he had been arrested by due process of law and, if found guilty, to be sentenced and punished in accordance with the laws of the State of Georgia, all of said rights, privileges and immunities being secured to the said Negro citizen by the Fourteenth Amend-

ment to the Constitution of the United States as against any person vested with and acting under the authority of the State of Georgia; and then set out the plan and purpose by which the objectives of the conspiracy were to be accomplished. The defendants filed a motion to dismiss or quash each of the three counts, and Judge Bascom S. Deaver signed a memorandum opinion overruling the motions as to counts 2 and 3, but sustaining the motion as to count 1, saying: "section 51 [now 241], as construed by this court was not intended to cover a transaction such as is alleged in the first count." It is significant that the Government did not challenge that ruling as to count 1, although under the Criminal Appeals Act of 1907, 18 U.S.C.A. § 3731, the Government could have secured a review in the Supreme Court. The Government's failure to appeal Judge Deaver's ruling is consistent with its concession in its brief filed in *Hodges v. United States*, *supra*, and quoted in the decision of said case at page 18, which concession, after referring to certain decisions of the Supreme Court, said:

"With these decisions, and many others that might be cited, before us, it is vain to contend that the Federal Constitution secures to a citizen of the United States the right to work at a given occupation or particular calling free from injury, oppression, or interference by individual citizens.

"Even though such right be a natural or inalienable right, the duty of protecting the citizen in the enjoyment of such right, free from individual interference, rests alone with the State.

"Unless, therefore, the additional element to wit, the infliction of an injury upon one individual citizen by another, solely on account of his color, be sufficient ground to redress such injury the individual citizen suffering such injury must be left for redress of his grievance to the state laws."

Indeed, the failure to appeal Judge Deaver's ruling is of added significance because Count 1 of the *Screws* indictment alleged that among the rights of which the Negro citizen was to be deprived was "the right and

privilege not to be denied equal protection of the laws; the right and privilege not to be subjected to different punishment, pains and penalties by reason of his race and color than are prescribed for the punishment of other citizens."

Two decisions regarding the rights of citizens in reference to labor organizations are of interest and are consistent with the views here expressed. In *United States v. Moore*, 129 Fed. 630 (Circuit Court, N.D. Ala., S.D., 1904), it is held that the right of miners to organize is not a right or privilege coming within § 241, and that the enforcement of such right depends entirely upon the States. The case of *United States v. Bailes*, 120 F. Supp. 614 (S.D. W. Va. 1954), brings that holding up to date, applying it to the right of citizens to refrain from joining a labor organization even though the National Labor Relations Act, a statute tracing its validity to the Commerce Clause of the Constitution, secures such right as against employers, labor unions, and agents. These cases recognize that these rights of citizens to join or not to join labor organizations are fundamental rights of citizens in all free governments, and the *Bailes* case recognizes the fact that such rights, even though recognized by an Act of Congress, do not become rights of a citizen of the United States as such. See also *United States v. Berke Cake Co.*, 50 F. Supp. 311, E.D. N.Y. 1943), rejecting the [fol. 38] Government's attempt to bring within the scope of § 241 the rights of employees recognized by the Fair Labor Standards Act, which, of course, traces its validity to the Commerce Clause.

This court is convinced that the five numerical paragraphs of rights and privileges set forth in this indictment are not federal citizenship rights and privileges; not "federal rights and privileges which appertain to citizens as such", 179 F. 2d at 648, and do not come within the scope of § 241, but are rights and privileges which are in their nature fundamental, and which belong of right to all citizens of all free governments, and which have belonged to all the free citizens of the several states ever since those states became free, independent and sovereign. For a discussion of these fundamental rights and privileges,

see *Corfield v. Coryell*, 4 Wash. C.C. 371, and the *Slaughter-House* cases, 16 Wall. 36, 76, 83 U. S. 36, 76, 21 L. ed 394, 408. Insofar as said five paragraphs of rights and privileges embrace the right to be free from discrimination by reason of race or color, such rights are Fourteenth Amendment rights, which, as we have seen, are not encompassed by § 241. The Government contends that the rights enumerated in paragraph 1 stem from Title 2 of the Civil Rights Act of 1964, and thus automatically come within the purview of § 241. The Government conceded on oral argument that paragraph one would add nothing to the indictment absent the Act. It is not clear how the rights mentioned in paragraph one can be said to come from the Act because § 201(a), upon which the draftsman doubtless relied, lists the essential element "without discrimination or segregation on the ground of race, color, religion, or national origin." This element is omitted from paragraph one of the indictment, and does not appear in the charging part of the indictment. The [fol. 39] Supreme Court said in *Cruikshank*, *supra*, at page 556, where deprivation of right to vote was involved,

"We may suspect that 'race' was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offense and cannot be supplied by implication. Everything essential must be charged positively, not inferentially. The defect here is not in form, but in substance."

The contention as to the rights and privileges specified in paragraphs 2 through 5 is that they are derived from the Fourteenth Amendment, and may be vindicated by prosecutions under § 241. As we have previously seen, this does not follow. Additionally, the Government contends that the rights and privileges set forth in paragraphs 2 and 3 are derived from Title 3 of the Act dealing with public facilities and that the right and privilege described in paragraph 4 is a right arising from the substantive powers of the Federal Government and thus falls within the protection of § 241. We think it clearly appears from the authorities above cited that tracing a right or privilege to the Fourteenth Amendment does not entitle it to

coverage under § 241. We think it clear also that the right asserted in paragraph 4 to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of the State in Interstate commerce within the State of Georgia is not an attribute of national citizenship. See *Wheeler v. United States*, *supra*. Travel rights including free ingress to a State and egress therefrom are rights inherent in citizens of all free governments including citizens of all the States and the States have full authority to punish violations of this fundamental right. *United States v. Wheeler*, *supra*, at 293. These rights were not created, or granted, by the Federal Constitution. Article IV of the Articles of Confederation recognized these rights as belonging to the "free citizens in the several states" and stipulated that "the people of each State shall have free ingress and regress to and [fol. 40] from any other State" Article IV, sec. 2 of the Constitution "plainly intended to preserve and enforce the limitation as to discrimination imposed upon the States by Article IV of the Articles of Confederation, and thus necessarily assumed the continued possession by the States of the reserved power to deal with free residence, ingress and egress" *United States v. Wheeler*, *supra*, at 294. Thus, these ordinary and usual travel rights are not federal citizenship rights and do not become such by virtue of the exercise of the Congressional power to regulate interstate commerce under Article I, sec. 8, of the Constitution. Regulation is not tantamount to creation, and if it were the creation would be for inhabitants and citizens of states generally and not exclusively for citizens of the United States.

Similarly, as we have seen, the Fourteenth Amendment did not create, grant or secure federal citizenship rights. It broadened the base of citizenship. It increased the number of citizens. It did not increase the rights of State citizens or of federal citizens as against other citizens. It made citizens of those who had theretofore not been citizens. The post-bellum Amendments neither separately nor collectively made these new citizens wards of the Federal Government like the Indian tribes, for instance. The Supreme Court has said that members of the African

race "took no more from the [13th] Amendment than any other citizen of the United States" and that the emancipated slaves were required by these Amendments to take "their chances with other citizens in the States where they should make their homes." *Hodges v. United States*, 203 U. S. 1, 18-20, 51 L. ed 65, 69-70 (1906). As pointed out by the Supreme Court in the *Cruikshank* case in 1876, "the equality of the rights of citizens is a principle of republicanism." Each State is duty bound to protect all its citizens in the enjoyment of this principle of the [fol. 41] equality of rights. This right to equality is not a federally created, granted, or secured right. The Fourteenth Amendment merely grants a guaranty against denial of equal protection by the States, and the power of the Federal Government is limited to the enforcement of this guaranty. See *United States v. Cruikshank*, *supra*, at 554.

We feel certain also, as was conceded by the Government on oral argument, that paragraph 5 of the indictment referring to "other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia" contributes nothing toward the validity of the indictment because of the element of vagueness. This matter of vagueness will be discussed later.

Having decided that none of these rights and privileges are federal citizenship rights and privileges, that none of them appertain to federal citizenship as such, we need go no further. We are convinced, however, that the Civil Rights Act of 1964 in no way aids the prosecution. It seems crystal clear that the Congress in enacting the Civil Rights Act of 1964 did not intend to subject anyone to any possible criminal penalties except those specifically provided for in the Act itself. Throughout the Act are provisions for injunctive relief, including restraining orders and temporary and permanent injunctions. Section 1101, in part, reads:

"In any proceeding for criminal contempt arising under title II, III, IV, V, VI, or VII of this Act, the accused, upon demand therefor, shall be entitled to a trial by jury, which shall conform as near as may be to the practice in criminal cases. Upon con-

viction, the accused shall not be fined more than \$1,000 or imprisoned for more than six months,"

and § 207(b) says:

[fol. 42] "The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right."

The Congress could hardly have made plainer its intention not to bring into play the ninety-four year old ten year felony statute.⁴ Indeed, in the recent case of *Atlanta Motel v. United States*, — U. S. — (Dec. 14, 1964), the Supreme Court, after an analysis of Title II of the Act, concludes that under it "remedies are limited to civil actions for preventive relief."

In the *Williams* case, decided in 1950, the Supreme Court pointed out that these §§ 241 and 242 had in the various codifications been considered by Congress subse-

⁴ Senator Humphrey, the leading spokesman for the Civil Rights Act, explained subsection 207(b) in a speech delivered on the floor of the Senate on May 1, 1964, as follows:

"The clause which reads that 'the remedies provided in this Title shall be the exclusive means of enforcing the rights hereby created' is designed to make clear that a violation of sections 201 and 202 cannot result in criminal prosecution of the violator or in a judgment of money damages against him. This language is necessary because otherwise it could be contended that a violation of these provisions would result in criminal liability under 18 U.S.C. 241 or 242 Thus, the first clause in section [207(b)] simply expresses the intention of Congress that the rights created by Title II may be enforced only as provided in Title II. This would mean, for example, that a proprietor in the first instance, legitimately but erroneously believes his establishment is not covered by section 201 or section 202 need not fear a jail sentence or a damage action if his judgment as to the coverage of Title II is wrong."

quent to their original enactment, not once but four times, without any change in substance, notwithstanding the Court's consistent course of decisions, dating from *Cruikshank* in 1876, indicating that § 241 was in practice in [fol. 43] terpreted to protect only rights arising from the existence and powers of the Federal Government. Now fourteen years later it can perhaps even more significantly be observed that the Congress, even with the *Williams* decisions before it and in the light of the careful consideration given to the entire subject of civil rights incident to the passage of the Civil Rights Act of 1964, has chosen not to broaden the long standing interpretations of this section. Both of the *Williams* decisions were careful not to question the power of the Congress to enforce by appropriate criminal sanctions every right guaranteed by the Due Process Clause of the Fourteenth Amendment. The question of the power of the Congress under the Constitution to legislate in this field is not here in question. This important matter of "the wise adjustment between State responsibility and national control of essentially local affairs" 341 U. S. 70, 73 is the responsibility of the Congress. The courts are not to invade this field beyond the manifest Congressional intent.

The fact that the *Williams* cases were decided by divided courts, 2 to 1 in the court of appeals, and 5 to 4 in the Supreme Court, and the fact that one of the Supreme Court Justices concurred in the majority opinion upon grounds other than those expressed in the opinion written by Mr. Justice Frankfurter for the majority, does not militate against the soundness of the views expressed in the majority and controlling opinions. Each of these decisions, though lacking unanimity, is a binding precedent upon this court under the familiar doctrine of *stare decisis*.

Moreover, it follows from the *Screws* decision by the Supreme Court and from the *Williams* decision by the court of appeals that any broader construction of § 241 than to cover only federal citizenship rights as such would render it void for indefiniteness.⁵

⁵ The Supreme Court did not reach the question of vagueness in the *Williams* case.

[fol. 44] The court of appeals in Williams said:

"The failure [of § 241 to create a crime if such broader interpretation be given it] lies in the application of the statute to the provision of the Fourteenth Amendment, 'Nor shall any State deprive any person of life, liberty, or property, without due process of law,' because of the extreme vagueness of the quoted clause. Reference is made to the discussions of a similar question touching Sec. 20 in *Screws v. United States*, 325 U. S. 91, 65 S.Ct. 1031, 89 L. Ed. 1495, 162 A.L.R. 1330, wherein by a closely divided court that statute was upheld because it provided that 'wilful' violations only were to be crimes, and that meant that the accused, exercising the power of the State, not only deprived another of a federally secured right, but knew it was such, and wilfully flouted the Constitution and laws of the United States. This indictment does not charge these defendants with 'wilfulness', nor does the statute mention it, and the judge refused to give the jury on request charges that 'wilfulness' was a necessary element of the case.

"2. The Congress and the federal court are themselves faced here with the provision of the Fifth Amendment that 'No person shall * * * be deprived of life, liberty, or property without due process of law', and it is found right in the midst of provisions in the Fifth and Sixth Amendments about federal prosecutions for crime. It is well understood that 'due process' applies not only to court procedure but also to legislation, especially in criminal matters. There are no common law federal crimes, but all are created by statute, though common law words in the statute may take their intended meaning from the common law. Not only must the accusation inform the accused for what he is to be tried, but due process requires that the statute must inform the citizen in advance by a reasonably ascertainable standard what the crime shall be. A judge may not establish the standard, save by reasonable interpreta-

tion, after the deed is done, for that is in substance to give the statute life *ex post facto*, which the Constitution forbids also. All this we understood to be admitted by all the justices in the opinions in the Screws case. The word 'wilful' in Sec. 20 was held by the majority to mean that the accused knew that the federal right existed and intentionally and purposely violated it, and his knowledge and wilfulness made him a criminal." At 647.

[fol. 45] The court of appeals held further that while the word "conspire" has some connotation of criminality it does not have the force of the word "wilfully" appearing in § 242, and that it was solely because of the word "wilfully" so appearing that the Supreme Court, in *Screws*, held § 242 valid. The Supreme Court, in *Screws*, recognized that "if the Act falls by reason of vagueness so far as due process of law is concerned, there would seem to be a similar lack of specificity when the privileges and immunities clause . . . and the equal protection clause . . . of the Fourteenth Amendment are involved." *Screws v. United States*, 325 U. S. 91, 100, 89 L. ed 1495, 1502.*

Certainly all law-abiding, liberty-loving citizens would feel that if the defendants did what the indictment charges they should be tried, and if, after a fair trial, convicted, that they should be appropriately punished; but the question is by what authority should they be tried, and if, after a fair trial, convicted appropriately punished. The enforcement of general criminal laws is a local matter with authority and responsibility resting squarely and solely upon local city, county and state governmental authorities. It is common knowledge that two of the defendants, Sims and Myers, have already been prosecuted in the Superior Court of Madison County, Georgia for the murder of Lemuel A. Penn and by a jury found not

* This element of vagueness proves fatal to State statutes. For instance, Georgia's insurrection statute, *Herndon v. Lowry*, 301 U. S. 242, 81 L. ed 1066; Georgia's statute against unlawful assemblies for the purpose of disturbing the peace, *Wright v. Georgia*, 373 U. S. 284, 10 L. ed 2d 349. It has had the same effect upon South Carolina's common law crime of breach of the peace, *Edwards v. South Carolina*, 372 U. S. 229, 9 L. ed 2d 697.

guilty. As important and desirable as it is that the defendants be tried where not already tried, and if, after a fair trial, convicted that they be appropriately punished, it is equally important that this court not usurp jurisdiction where it has none.

Fortunately, under the Criminal Appeals Act, 18 U.S.C.A. § 3731, the Government has a speedy remedy for a review of this ruling by the Supreme Court, and if it be there adjudicated that this indictment is valid a trial can yet be had.

Let an order be entered sustaining the defendants' motions to dismiss.

This 29 day of December, 1964.

/s/ W. A. Bootle
United States District Judge

[Certificate of Service (omitted in printing)]

[fol. 47]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

[File Endorsement Omitted]

Criminal No. 2232

UNITED STATES OF AMERICA

vs

HERBERT GUEST, JAMES S. LACKEY, CECIL WILLIAM
MYERS, DENVER PHILLIPS, JOSEPH HOWARD SIMS,
GEORGE HAMPTON TURNER

FINAL ORDER—January 8, 1965

Pursuant to the memorandum opinion of this Court
dated December 29, 1964, it is

CONSIDERED, ORDERED AND ADJUDGED that
the indictment in the above-styled case be and the same
is hereby dismissed.

SO ORDERED, this the 8th day of January, 1965.

/s/ W. A. Bootle
United States District Judge

Presented by:

/s/ Floyd M. Buford
FLOYD M. BUFORD
United States Attorney

[Proof of Service (omitted in printing)]

[fol. 48]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

[File Endorsement Omitted]

Criminal No. 2232

UNITED STATES OF AMERICA

v.

HERBERT GUEST, JAMES SPERGEON LACKEY, CECIL WILLIAM MYERS, DENVER WILLIS PHILLIPS, JOSEPH HOWARD SIMS, GEORGE HAMPTON TURNER

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—filed January 27, 1965

I. Notice is hereby given that the United States of America, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order dismissing the indictment under 18 U.S.C. 241 entered in this action on January 8, 1965.

This appeal is taken pursuant to 18 U.S.C. 3731.

II. The clerk will please prepare a transcript of the record of this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the entire record below.

III. The following question is presented by this appeal:

[fol. 49] Whether the district court erred in ruling that the indictment herein did not charge an offense punishable under 18 U.S.C. 241.

/s/ John Doar,
Acting Assistant Attorney
General

/s/ Floyd M. Buford
United States Attorney

/s/ St. John Barrett

/s/ Harold H. Greene

/s/ Howard A. Glickstein
Attorneys,
Department of Justice,
Washington, D. C. 20530

[fol. 50]

[Proof of Service (omitted in printing)]

[fol. 51]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA,
ATHENS DIVISION

Criminal Docket 2232

THE UNITED STATES

vs.

HERBERT GUEST, JAMES SPERGEON LACKEY, CECIL WILLIAM MYERS, DENVER WILLIS PHILLIPS, JOSEPH HOWARD SIMS, GEORGE HAMPTON TURNER

Vio: T.18 S. 241: Conspiracy to vio. negro rights.

For U. S.:

FLOYD M. BUFORD
U. S. Attorney
Macon, Georgia

For Defendant:

JAMES E. HUDSON
Athens, Ga.
NICK CHILIVIS (Lackey)
Athens, Ga.
ROBERT B. THOMPSON (Lackey)
Gainesville, Ga.

* * * * *

DOCKET ENTRIES

Date

- 10-16-64 Filed Criminal Indictment & Vote of Grand Jury.
J. S. 2 prepared.
10-16-64 Warrant of Arrest issued for Denver Willis Phillips.
10-16-64 Warrant of Arrest issued for Hampton Turner.
10-16-64 Filed U. S. Commissioner's Report of Proceedings including all pleadings and documents of record filed before the indictment and including an Appearance Bond in the amount of \$25,000.00 each for Herbert Guest, Cecil William Meyers & Joseph Howard Sims.

Date

- 10-18-64 Filed U. S. Commissioner's Report of Proceedings as to Willis Phillips including an Appearance Bond in amount of \$10,000.00.
- 10-22-64 Filed U. S. Commissioner's Report of Proceedings as to George Hampton Turner including an Appearance Bond in amount of \$10,000.00.
- 10-23-64 Filed Defendant Turner's Motion for Bill of Particulars.
- [fol. 52]
- 10-23-64 Filed Defendant Guest's Motion for Bill of Particulars.
- 11-12-64 Filed MOTION TO STRIKE SURPLUSAGE by Lackey.
- 11-12-64 Filed MOTION TO DISMISS INDICTMENT by Lackey.
- 11-12-64 Filed MOTION FOR SPEEDY TRIAL by Lackey.
- 11-12-64 Filed CERTIFICATE OF SERVICE by Lackey.
- 11-18-64 Filed MOTION TO STRIKE SURPLUSAGE by Herbert Guest, Cecil Myers, Denver Phillips, Howard Sims & George Hampton Turner.
- 11-18-64 Filed MOTION TO DISMISS INDICTMENT by Herbert Guest, Cecil Myers, Denver Phillips, Howard Sims & George Hampton Turner.
- 12-10-64 Filed Electronic Recording of sentence hearing: Deft. All Record 63.
- 12-29-64 Filed Opinion of Judge W. A. Bootle stating that the Indictment shall be dismissed & directing that an Order be drawn dismissing the Indictment as to all defendants.
- 1-6-65 Filed Appearance Bond of James Spergeon Lackey in amount of \$25,000.00.
- 1-8-65 Filed Final Order dismissing indictment as to all defendants. (WAB).
- 1-8-65 JS 3 prepared for each defendant.
- 1-27-65 Filed Notice of Appeal to U. S. Supreme Court by U. S.

[fol. 53]

[Clerk's Certificates to foregoing papers and transcript omitted in printing.]

[fol. 54]

SUPREME COURT OF THE UNITED STATES

No. 1023, October Term, 1964

UNITED STATES, APPELLANT

v.

HERBERT GUEST, ET AL.

APPEAL from the United States District Court for the Middle District of Georgia.

ORDER POSTPONING JURISDICTION—June 1, 1965

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case is set for argument immediately following Nos. 948 and 949.

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1

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

HERBERT GUEST, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA, ATHENS DIVISION

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 17-41) is not yet reported.

JURISDICTION

The judgment of the district court dismissing the indictment against appellees (App. B. *infra*, p. 42) was entered on January 8, 1965. A notice of appeal to this Court was filed on January 27, 1965. The jurisdiction of this Court to review the decision of the district court on direct appeal is conferred by 18 U.S.C. 3731. *United States v. Braverman*, 373 U.S. 405.

(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, in pertinent part, provides:

SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

18 U.S.C. 241 provides:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined no more than \$5,000 or imprisoned not more than ten years or both.

QUESTIONS PRESENTED

1. Whether Section 241 of the Criminal Code reaches unofficial conspiracies against the exercise of rights secured by the Fourteenth Amendment.

2. Whether Section 241 reaches unofficial conspiracies against the exercise of rights secured by Title II of the Civil Rights Act of 1964, relating to places of public accommodation.

3. Whether Section 241 reaches unofficial conspiracies against the exercise of the right to freely enter and leave the State and the right to freely use the instrumentalities of interstate commerce.

STATEMENT

On October 16, 1964, the United States Grand Jury for the Middle District of Georgia returned an indictment charging six individuals with engaging in a criminal conspiracy in violation of 18 U.S.C. 241. None of the defendants was alleged to hold public office or to be acting "under color of law." The objects of the conspiracy were alleged to be—

to injure, oppress, threaten and intimidate Negro citizens of the United States in the vicinity of Athens, Georgia, in the free exercise and enjoyment by said Negro citizens of the following rights and privileges secured to them by the Constitution and the laws of the United States:

1. The right to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of motion picture theaters, restaurants, and other places of public accommodation;

2. The right to the full and equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof;

3. The right to the full and equal use on the same terms as white citizens of the public streets and highways in the vicinity of Athens, Georgia;

4. The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia;

5. Other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia.

The indictment particularized the means by which the conspirators planned to achieve their goal, which included beatings, shootings, killings, and other acts of violence against the persons and property of Negroes.¹

The defendants moved to dismiss the indictment on the ground that it did not charge an offense under the laws of the United States. The district court sustained the motion and dismissed the indictment as to all defendants (App. B., *infra*, p. 42).

Following the court of appeals decision in *Williams v. United States*, 179 F. 2d 644 (C.A. 5), affirmed partly on other grounds, 341 U.S. 70, the district court held that 18 U.S.C. 241 does not punish an invasion of rights secured by the Fourteenth Amendment—the only rights alleged by the indictment, in the court's view (App. A, *infra*, pp. 20–33). That ruling made it unnecessary to separately consider the further question whether wholly private conspiracies directed at Fourteenth Amendment rights are within the constitutional reach of Section 241. Focusing on paragraph

¹The full text of the indictment is reproduced in note 1 of the opinion below (App. A, *infra*, pp. 18–19).

4 of the indictment—which alleges interference with interstate travel and the use of interstate facilities (*supra*, p. 4)—the district court concluded that no right of national citizenship was there stated (App. A, *infra*, pp. 33–35). And it likewise rejected the contention that Titles II (public accommodations) and III (public facilities) of the Civil Rights Act of 1964 created federal rights that might be vindicated by a criminal prosecution under 18 U.S.C. 241 (App. A, *infra*, pp. 35–37).²

THE QUESTIONS ARE SUBSTANTIAL

Terrorism, intimidation and reprisal directed at American citizens because they are members of the Negro race asserting their federal constitutional and statutory rights are national concerns properly invoking national action. One hundred years ago, in somewhat comparable circumstances, the Congress responded by declaring it a crime against the United States to “conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States.” The Fourteenth Amendment itself had accorded the Negro a right to the equal utilization of public facilities owned or operated by the State. In 1964, the Congress confirmed the federal character of the constitutional priv-

² The district court also ruled that paragraph 5 of the indictment (alluding to “other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia”) was so vague and indefinite as to “contribute nothing toward the validity of the indictment” (App. A, *infra*, p. 35). We acquiesced in that ruling below and do not challenge it here.

ilege and added a right to the equal enjoyment of the advantages of privately owned places of public accommodation. Yet, it is now held that a violent conspiracy against those very rights is no offense against the United States—at least when (as is normally to be expected) the conspirators are not public officials. We challenge that ruling. Its reversal would enable the federal government to give important protection to civil rights. Furthermore, until this Court definitively resolves the constitutional and statutory questions now presented, neither the Executive nor the Congress can determine the need for new remedies or the appropriate solution.

There can be no dispute about the importance of the broad issue of the over-all reach of Section 241—the only federal statute that severely punishes invasions of civil rights by force and violence, and the only provision that punishes in any degree unofficial conspiracies so directed. The subsidiary questions presented here are, for that reason alone, of great significance. Some of them, moreover, have an independent importance. It remains only to show that their resolution below is not so clearly correct as to foreclose further argument.

1. The first question is whether Section 241 reaches unofficial conspiracies directed at blocking the exercise of specific rights secured by the Fourteenth Amendment. At the threshold is the contention—upheld below—that Section 241 does not encompass Fourteenth Amendment rights at all. That question was left unresolved by an evenly divided Court in *United States v. Williams*, 341 U.S. 70, and is now

before the Court in *United States v. Price*, Nos. 948 and 949, this Term. For the reasons stated by Mr. Justice Douglas for four members of the Court in *Williams* (see 341 U.S. at 90-93) and in our jurisdictional statement in *Price* (see pp. 6-7), we believe rights secured by the Fourteenth and Fifteenth Amendments are within the scope of Section 241. The further question here—assuming Fourteenth Amendment rights are encompassed—is whether the provision reaches private action designed to defeat the implementation of such rights.

There can be no doubt but that the drafters of Section 241 meant to punish unofficial conspiracies directed at the newly declared rights of Negro citizens. It is enough to remember that the provision had its "source * * * in the doings of the Ku Klux and the like," as Mr. Justice Holmes noted for the Court in *United States v. Mosley*, 238 U.S. 383, 387. And, of course—once it is established that a right declared by the Fourteenth Amendment is a "right or privilege secured * * * by the Constitution" within the provision—the language of Section 241 is plainly broad enough to cover wholly private conspiracies: the crime may be committed by any "two or more persons," whether or not holding public office or acting "under color of law." *Ex Parte Yarbrough*, 110 U.S. 651; *United States v. Waddell*, 112 U.S. 76; *Logan v. United States*, 144 U.S. 263; *In re Quarles*, 158 U.S. 532; *Motes v. United States*, 178 U.S. 458; see *United States v. Classic*, 313 U.S. 299, 315. The root question, then, is whether the statute, so construed, overreaches the constitutional power of Con-

gress because the Fourteenth Amendment is in terms addressed to the States alone.

We think not. The Fifth Section of the Fourteenth Amendment, it seems to us, authorized all measures which are necessary and proper to "enforce" Section 1. This comprehends the punishment of violence aimed at terrorizing the beneficiaries of the Amendment out of asserting the rights there declared. To deny legislative power to deal effectively with such conspiracies is to reduce the guarantees of the Fourteenth Amendment (and the Fifteenth, also) to empty exhortations whenever unofficial pressures are interposed between the citizen and his State government, which preserves its clean hands, unable or unwilling to interfere. That situation was too familiar to those who wrote the post-Civil War Amendments to suppose that they conferred upon Congress no power whatever to deal with so obvious a barrier to the practical implementation of the newly established constitutional rights.

Two points deserve emphasis. First, nothing we suggest here remotely trenches on the principle announced in the *Civil Rights Cases*, 109 U.S. 3, that the Fourteenth Amendment does not reach purely private racial discrimination. Our immediate focus, to be sure, is on unofficial action. But that is only a matter of remedy: the substantive rights protected are rights *against the State*, in the classical sense of the Fourteenth Amendment. Our submission is that the Amendment authorizes the imposition of a penalty on those who seek by violence to defeat equality before the law.

The second reservation is equally important: Our construction of Section 241 would not convert every assault on a Negro into a federal crime, nor even every such assault prompted by racial prejudice. Violence alone is outside Section 241. We say only that violence specifically intended to prevent the enjoyment of particular constitutional rights by a class of citizens is within the reach of the section.⁸ The requirement of a clear and direct connection between the acts condemned and the rights frustrated circumscribes the scope of the provision. Equivocal conduct remotely related to loosely defined constitutional rights is perhaps beyond federal jurisdiction. See *United States v. Cruikshank*, 92 U.S. 542; *United States v. Harris*, 106 U.S. 629; *Hodges v. United States*, 203 U.S. 1. The attempt to reach so far by a criminal statute might, in any event, fail for undue vagueness. See *Screws v. United States*, 325 U.S. 91. But no such problems are involved here. The present charge is that deliberate acts of violence were committed for the explicit purpose of terrorizing, on account of their race alone, an identifiable class of persons and thus to prevent them from asserting the specific and indisputable right to enjoy the benefit of public facilities owned or operated by the State—a right expressly declared by repeated decisions of this Court and recently recognized by the Congress as

⁸ For example, the beating of a Negro is normally an offense only against the State, just as the beating of a white man, even if the motive was racial hostility. But the beating of a Negro parent to dissuade him from entering his child in a nominally desegregated public school would fall within the scope of Section 241.

properly invoking federal action for its enforcement. See Civil Rights Act of 1964, Title III (78 Stat. 246), authorizing the Attorney General to vindicate the right by civil proceedings. Such a case, we urge, falls within the power of Congress to punish under the Fifth Section of the Fourteenth Amendment.

2. We turn to the allegation of the indictment that the conspiracy was directed, in part, to intimidate Negroes out of exercising their right to enjoy, equally with others, the advantages of privately owned places of public accommodation. Whether or not it has an independent source in the Equal Protection Clause of the Fourteenth Amendment (see *Bell v. Maryland*, 378 U.S. 226, 245-255 (opinion of Mr. Justice Douglas), 286-318 (opinion of Mr. Justice Goldberg), 326-343 (opinion of Mr. Justice Black)), the right involved is expressly declared by Title II of the Civil Rights Act of 1964,* which implements the Com-

* Perhaps the indictment should have explicitly alleged that the places of public accommodation referred to are subject to the Act. The implication is clear from the wording of the relevant paragraph ("motion picture theatres, restaurants and other places of public accommodation"), which borrows the terminology of Title II. Moreover, it is difficult to conceive of a restaurant that is not a covered establishment. See *Katzenbach v. McClung*, 379 U.S. 294, 298, 301-305; *Hamm v. Rock Hill*, 379 U.S. 306, 309-310. And, plainly, all motion picture theatres in Athens, Georgia, are covered. See § 201(c) (3) of the Act (78 Stat. 243). Of course, at trial, the government must show that the conspirators sought to prevent Negroes from asserting their right to enter, or be served at, establishments covered by the Act. The indictment, we submit, fairly apprises them of the charge. In any event, no such pleading objection was raised or noticed below and the question is probably not open on this direct appeal.

The court below did point to a wholly different omission, in

merce Clause. See *Atlanta Motel v. United States*, 379 U.S. 241. As a right "that flow[s] from the substantive powers of the Federal Government," it is one of the "federally created rights" that, everyone agrees, "may clearly be protected from private interference." *United States v. Williams*, 341 U.S. 70, 78 (opinion of Mr. Justice Frankfurter); *United States v. Waddell*, 112 U.S. 76. Thus, even under the most restrictive view of its scope, Section 241 would seem to reach a private conspiracy directed against the right to non-discriminatory treatment in places of public accommodations. But, though there is no constitutional obstacle, it is argued that Congress has deliberately foreclosed that result by providing in the statute creating the right that it shall be enforced only by equitable proceedings.

The contention is premised on the following declaration in Section 207(b) of the Act (78 Stat. 246): "The remedies provided in this title [*i.e.*, equitable remedies] shall be the exclusive means of enforcing the rights based on this title." No doubt,

alleging a violation of Title II rights, which it deemed serious. That is the failure to define the right to the equal advantages of privately owned places of public accommodation as an exemption from "discrimination or segregation on the ground of race, color, religion, or national origin." See Appendix A, *infra*, pp. 32-33. The objection, it seems to us, is without merit in light of the general allegation in the opening paragraph of the indictment—which qualifies all that follows—that the conspiracy was directed at Negroes, to deter Negroes (the same and others, presumably) from exercising their rights. See *supra*, p. 3. It is a mere quibble to suggest that the defendants were not sufficiently informed that they were charged with a conspiracy against Negroes as Negroes and not as individuals.

that provision bars both damage suits and criminal prosecutions in some situations. As Senator Humphrey noted in the congressional debates, a restaurant owner denying service in the erroneous belief that his establishment is not covered by the Act was not meant to be exposed to criminal prosecution under 18 U.S.C. 241 or 242. 110 Cong. Rec. (daily ed.) 9462. Indeed, it is doubtful if that case would, in any event, be within the reach of the criminal law. See *Screws v. United States*, *supra*; *United States v. Williams*, *supra*, 341 U.S. at 93-94 (opinion of Mr. Justice Douglas, dissenting). But, cf. *Guinn v. United States*, 238 U.S. 347. We may assume that the 1964 Act also proscribes criminal prosecution for a knowingly unjustified denial of service, which, though unaccompanied by violence of any kind, would otherwise subject a group of operators to the penalties of Section 241. See *United States v. Mosley*, 238 U.S. 333. But it does not follow that those who engage in a conspiracy of violence designed to terrorize Negroes so that they will not even attempt to assert their right to service at clearly covered places of public accommodation are likewise immunized from the federal criminal law. That result is so startling that we should not impute it to the congressional purpose unless the text plainly compels it.

Terrorists, unconnected with any establishment, are plainly in a different posture from the owner of a particular restaurant who merely fails to accord non-discriminatory service; punishing them does something more than "enforce" the "rights created by" Title II. There are aggravating elements here that

more urgently call for criminal sanctions. By definition, there is a conspiracy, involving a number of persons with a broader purpose and a greater capacity for harm than the manager of a single establishment. Nor are the conspirators simply denying service; they are engaged in threats, intimidation and reprisal—dangerous and violent conduct. Unlike the owner, they are acting from malice; they are not responding to community pressures or fears of economic loss. And, of course, in their case, honest doubts about Title II coverage are not involved. In short, the policy behind the law's benevolent exemption from criminal liability and the delays granted to owners and operators is inapplicable to outsiders engaged in a conspiracy of terror.⁵

The Civil Rights Act of 1964 created a new federal right to nondiscriminatory treatment in places of public accommodation and provided for its direct enforcement by equity. Congress, to be sure, declined to make it a crime to peaceably deny the right. Yet the Act did create a new civil right and its provisions should not be construed to suspend the general law punishing forcible conspiracies against the assertion of the newly won right. In this application,

⁵ To be sure, Sections 203 and 204 of the Civil Rights Act of 1964 (78 Stat. 244) provide for injunctive relief against those who "intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or * * * punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202." But that remedy—directed against substantive acts, rather than conspiracies—is wholly insufficient for a case like the present.

Section 241 is an "other Federal * * * law not inconsistent with [Title II]" which Section 207(b) of the 1964 Act (78 Stat. 246), was not intended to render inoperative.

3. Finally, the indictment (in paragraph 4, *supra*, p. 4) charges a conspiracy to interfere with "[t]he right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia." Of course, these rights are guaranteed against unreasonable or discriminatory State obstruction by the Commerce Clause of the original Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. See *Edwards v. California*, 314 U.S. 160; *Morgan v. Virginia*, 328 U.S. 373; *Williams v. Fears*, 179 U.S. 270, 274; *Gayle v. Browder*, 352 U.S. 903, affirming 142 F. Supp. 707. Cf. *Kent v. Dulles*, 357 U.S. 116, 125-127; *Aptheker v. Secretary of State*, 378 U.S. 500, 505-506. We submit, however, that the rights described are also privileges of national citizenship—"federal rights"—which are secured by the Constitution against private interference. See *Crandall v. Nevada*, 6 Wall. 35, 43-44; *Twining v. New Jersey*, 211 U.S. 78, 97; *Edwards v. California*, 314 U.S. 160, 177 (concurring opinion of Mr. Justice Douglas); *United States v. U.S. Klans*, 194 F. Supp. 897 (M.D. Ala.); *United States v. Lassiter*, 203 F. Supp. 20 (W.D. La.), affirmed, 371 U.S. 10. Cf. *In re Debs*, 158 U.S. 564.⁶

⁶ See, also, *New York v. O'Neill*, 359 U.S. 1, 7 (opinion of the Court), 12-14 (opinion of Mr. Justice Douglas); *Bell v. Maryland*, 378 U.S. 226, 249-255 (opinion of Mr. Justice Douglas), 293-294 and n. 10 (opinion of Mr. Justice Goldberg).

As such, they can be vindicated by a prosecution under Section 241, even accepting the most restrictive view of that enactment. See *Williams v. United States*, 341 U.S. 70, 78 (opinion of Mr. Justice Frankfurter).

CONCLUSION

For the foregoing reasons, we respectfully submit that probable jurisdiction should be noted and the case set down for plenary consideration.

ARCHIBALD COX,
Solicitor General.

JOHN DOAR,
Acting Assistant Attorney General.

LOUIS F. CLAIBORNE,
Assistant to the Solicitor General.

HAROLD H. GREENE,

HOWARD A. GLICKSTEIN,
Attorneys.

MARCH 1965.

as much as it can be justified by a presentment under
Section 541, which section the most restrictive view of
that amendment, *Ex parte* (1884), 144
U.S. 70, 78 (opinion of Mr. Justice Frankfurter).

For the foregoing reasons we respectfully submit
that the proposed amendment should be noted and the
case set down for future consideration.

Very respectfully,
Arthur H. Hays
Solicitor General

JOHN DOOR

Attorney General

JOHN R. CLARK

Attorney General

JOHN R. CLARK

Attorney General

JOHN R. CLARK

Attorney General

JOHN R. CLARK

Attorney General

JOHN R. CLARK

Attorney General

JOHN R. CLARK

Attorney General

JOHN R. CLARK

Attorney General

APPENDIX A

**In the United States District Court for the Middle
District of Georgia, Athens Division**

Criminal No. 2232

UNITED STATES OF AMERICA

v.

**HERBERT GUEST, JAMES SPERGEON LACKEY, CECIL WIL-
LIAM MYERS, DENVER WILLIS PHILLIPS, JOSEPH
HOWARD SIMS, GEORGE HAMPTON TURNER**

BOOTLE, District Judge:

For decision now are the defendants' motions to dismiss the indictment on the ground that it does not charge an offense under the laws of the United States.⁽¹⁾ A study of the question thus raised necessitates reference to some significant historical facts and a careful consideration of a few important Constitutional principles.

First, it must be noted that our Federal Government is a Government of limited powers, limited in number though not in degree. It can pinpoint its birth on the calendar. There was the ineffectual attempt under the Articles of Confederation. Then, there was the gloriously successful genesis under the Constitution. While the Federal Government is supreme in its sphere, its sphere is circumscribed. Its every power stems from a written instrument, the

Constitution, or does not exist. It is that Constitution and the laws made in pursuance thereof that constitute the supreme law of the land.

Secondly, it must be remembered that federal courts are courts of limited jurisdiction. This necessarily follows from the fact that the Federal Government, under which these courts are created, is a Government

¹ The indictment reads:

THE GRAND JURY CHARGES:

"Commencing on or about January 1, 1964, and continuing to the date of this indictment, HERBERT GUEST, JAMES SPERGEON LACKEY, CECIL WILLIAM MYERS, DENVER WILLIS PHILLIPS, JOSEPH HOWARD SIMS, AND GEORGE HAMPTON TURNER, did within the Middle District of Georgia, Athens Division, conspire together, with each other, and with other persons to the Grand Jury unknown, to injure, oppress, threaten and intimidate Negro citizens of the United States in the vicinity of Athens, Georgia, in the free exercise and enjoyment by said Negro citizens of the following rights and privileges secured to them by the Constitution and the laws of the United States;

"1. The right to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of motion picture theaters, restaurants, and other places of public accommodation.

"2. The right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof;

"3. The right to the full and equal use on the same terms as white citizens of the public streets and highways in the vicinity of Athens, Georgia;

"4. The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia;

"5. Other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia;

"It was a part of the plan and purpose of the conspi-

of limited powers. The federal courts have only such powers, only such jurisdiction as is conferred upon them by valid acts of Congress. There is no such thing as federal common law criminal jurisdiction. When a prosecution is brought against any person in a federal court, that person is entitled to ask under what valid act of Congress he is charged. The defendants so inquire by these motions to dismiss.

Thirdly, we should remember that any statute seeking to proscribe human conduct, making criminal that which but for the statute would be unpunishable in the court where such statute is sought to be enforced, must specifically describe the conduct denounced. This is elementary in the concept of due process of law, a principle applicable to the Federal Government under the Fifth Amendment, as well as to the States under the Fourteenth.

What is being said here is not new. On many occasions courts have measured indictments like this one against the principles above mentioned. There

racy that its objects be achieved by various means, including the following:

"1. By shooting Negroes;

"2. By beating Negroes;

"3. By killing Negroes;

"4. By damaging and destroying property of Negroes;

"5. By pursuing Negroes in automobiles and threatening them with guns;

"6. By making telephone calls to Negroes to threaten their lives, property, and persons, and by making such threats in person;

"7. By going in disguise on the highway and on the premises of other persons;

"8. By causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts; and

"9. By burning crosses at night in public view.

"All in violation of Section 241, Title 18, United States Code."

has not been found any authoritative decision which this court can construe as going so far as to hold this indictment valid.² On the contrary, both of the two courts whose decisions are binding upon this court have fairly recently rendered decisions which this court construes as clearly invalidating this indictment.

The statute upon which the Government relies originated as Section 6 of the Act of May 31, 1870, 16 Stat. 140. It subsequently and successively became known as Section 5508 of the Revised Statutes of 1874-1878, Section 19 of the Criminal Code of 1909, and 18 U.S.C.A. § 51, 1926 edition, and is presently 18 U.S.C.A. § 241, 1948 edition, which reads as follows:

“Conspiracy against rights of citizens.

“If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

“If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

“They shall be fined not more than \$5,000 or imprisoned not more than ten years, or both.”

Now nearly ninety-five years old, this statute has been construed by the courts on several occasions. We now have it upon the authority of the court of appeals for the Fifth Circuit, and upon the authority of the Supreme Court that this statute was never intended by the Congress to embrace, and therefore does not

²The few early decisions to the contrary are rejected by the Supreme Court in footnote 8 in *United States v. Williams*, 341 U.S. 70, 81.

embrace, the Fourteenth Amendment rights. *Williams v. United States*, 179 F. 2d 644 (5th Cir. 1950); *Powe v. United States*, 109 F. 2d 147 (5th Cir. 1940); *United States v. Williams*, 341 U.S. 70, 95 L. ed 758 (1951). The precise holding of the court of appeals on this point in the *Williams* case in a clear, analytical and forceful opinion by Judge Sibley, concurred in by Judge Waller, Judge Holmes Dissenting, was:

"In the conspiracy provision (section 241) the Congress had in mind the federal rights and privileges which appertain to citizens as such and not the general rights extended to all persons by the clause of the Fourteenth Amendment. The citizen's rights are specifically stated in the Constitution and statutes, and in them may be found a standard of conduct. Such was the case in *United States v. Classic*, 313 U.S. 299, 61 S. Ct. 1031, 85 L. ed. 1368, when the right of the citizen to vote for a Congressman was involved. *Ex parte Yarborough*, 110 U.S. 651, 4 S. Ct. 152, 28 L. Ed. 274, like the *Classic* case, involved the right of a citizen to vote. The Fifteenth and not the Fourteenth Amendment was rested upon. We are of the opinion that this provision on Sec. 19 (section 241) was not intended to include rights under the due process clause of the Fourteenth Amendment secured not to citizens only, but to everyone."

That holding of the court of appeals was affirmed by the Supreme Court in an equally clear and convincing opinion by Mr. Justice Frankfurter, who wrote,

"we agree that § 241 * * * does not reach the conduct laid as an offense in the prosecution here. This is not because we deny the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment; nor is it because we fully accept the course of

reasoning of the court below. We base our decision on the history of § 241, its text and context, the statutory framework in which it stands, its practical and judicial application—controlling elements in construing a federal criminal provision that affects the wise adjustment between State responsibility and national control of essentially local affairs. The elements all converge in one direction. They lead us to hold that § 241 only covers conduct which interferes with rights arising from the substantive powers of the Federal Government.”

In the *Williams* case both the court of appeals and Supreme Court made a detailed study of § 241 and also of its companion statute, § 242, which consecutively has been section 2 of the Act of April 9, 1866, 14 Stat. 27, section 17 of the Act of May 31, 1870, 16 Stat. 144, section 5510 of the Revised Statutes of 1874-1878, section 20 of the Criminal Code of 1909, 35 Stat. 1092, 18 U.S.C.A. § 52, 1925 edition, and now 18 U.S.C.A. § 242, 1948 edition. Attached to the opinion of the Supreme Court is a comparative table showing the successive phraseology of these two statutes.

The differences in these two Code sections are succinctly pointed out by Judge Sibley, at page 647, as follows:

“Sec. 19 (now 241) differs much from Sec. 20 (now 242), though both have to do with federally secured rights. Sec. 20 (now 242) creates a misdemeanor offense; it speaks of color of law, and of ‘inhabitant of any State’, and of discrimination in punishment on account of alienage or color or race. It punishes acts. Sec. 19 (now 241) punishes only conspiracy; it makes no reference to Sec. 20 (now 242), or to color of law, or to State, or to race or color; it adds also a separate and independent crime, the act of two or more persons going in disguise on the highway or premises of an-

other with the bad intent named; and the punishment is that of felony, and ineligibility to hold office. Wilfulness is not mentioned, nor is 'intent' in the defining of the crime of conspiracy. It does not protect 'inhabitants', but only 'any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States.'"

And the Supreme Court concluded:

"All the evidence points to the same conclusion: that § 241 applies only to interference with rights which arise from the relation of the victim and the Federal Government, and not to interference by State officers with rights which the Federal Government merely guarantees from abridgement by the States." P. 81.

Actually, the court of appeals and the Supreme Court went further in the *Williams* case than we are called upon to go in this case because the indictment in the *Williams* case charged that the defendants acted under color of State law, thus incorporating the sometimes magical words from § 242. Nevertheless, the § 242 one year misdemeanor could not thus be converted into a § 241 ten year felony. The Court said:

"the validity of a conviction under § 241 depends upon the scope of that section, which cannot be expanded by the draftsman of an indictment."

The indictment in the case at bar contains not the slightest suggestion of State action, the color of law ingredient necessary under § 242.³ It would be hard

³ There was a series of prosecutions which have become known as "the *Williams* cases". One indictment was under § 241. The conviction under that indictment is the subject matter of *Williams v. United States*, 179 F. 2d 644 (5th Cir. 1950) and *United States v. Williams*, 341 U.S. 70, above cited.

to imagine that Congress intended that these two sections of the same Act of 1870 apply to and cover the same rights because as Judge Sibley wrote:

"It would certainly be strange that in the same Act of 1870 the Congress should punish the consummated deprivation of rights by such acts as are here charged only when wilfully done, and only as a misdemeanor (under 242); but should punish as a ten year felony with deprivation of the power to hold federal office, the bare conspiring to do such a thing though not wilfully, and with nothing more in fact done."

The indictment in that case charged in substance that the defendants acting under the laws of the State of Florida conspired to injure a citizen of the United States and of Florida in the free exercise and enjoyment of the rights and privileges secured to him and protected by the Fourteenth Amendment, to-wit, the right not to be deprived of liberty without due process of law; the right to be secure in his person while in the custody of the State of Florida; and to be immune from illegal assault and battery while in the custody of persons acting under color of the laws of Florida by persons exercising the authority of the State of Florida, and the right to be tried and punished, if guilty, by due process of law under the laws of Florida. Three of the defendants, including Williams, were alleged to have, and have conspired to use, authority under the State of Florida. It was the conviction under that indictment which the court of appeals and the Supreme Court set aside for the reasons above stated.

Williams was also convicted under an indictment drawn under § 242, it being established that he acted under color of law and the trial court having applied to § 242 the interpretation, with emphasis upon the word "wilfully", as required by the Supreme Court decision in *Screws v. United States*, 325 U.S. 91, 80 L. ed. 1495 (1945). That conviction was dealt with and affirmed in *Williams v. United States*, 179 F. 2d 656 (5th Cir. 1950), and *Williams v. United States*, 341 U.S. 97, 95 L. ed. 774 (1951).

A third case dealt with perjury, and is reported as *United States v. Williams*, 93 F. Supp. 922 (S.D. Fla. 1950) and *United States v. Williams*, 341 U.S. 58, 95 L. ed. 747 (1951).

The inclusion of the element of conspiracy in § 241 would hardly account for an increase of nine years in the maximum punishment when we remember that the general offense of conspiracy, until recently, carried only a two year maximum sentence. Nor would the presence of the requirement of State action in § 242 and its absence in § 241 reasonably account for the more severe penalty against private defendants and the less severe penalty against those acting under color of law. When Congress enacted the Civil Rights Act of March 1, 1875, entitled "An Act to Protect All Citizens in Their Civil and Legal Rights" held unconstitutional in the Civil Rights Cases, 109 U.S. 2, 27 L. ed. 835 (1883), thus undertaking to protect Fourteenth Amendment rights generally, it prescribed as punishment forfeiture of \$500 to the person aggrieved, a fine of not more than \$1,000, and imprisonment ranging from 30 days to one year.

As the Supreme Court pointed out, to construe § 241 as embracing Fourteenth Amendment rights generally rather than the rights of federal citizens as such would be not only a new, but a distorting, construction of an old statute making for redundancy and confusion, and if we assume that the conspiracy is under color of State law it can be reached under § 242 with the aid of the general conspiracy statute. Under the construction of § 241, contended for by the Government in the *Williams* case and in the case at bar, any conduct punishable under § 242 with the aid of the general conspiracy statute would also be punishable under § 241, and any conduct punishable under § 241, would also be punishable under § 242 with the aid of the general conspiracy statute if we add only the element of acting under color of State law, and this notwithstanding the vast difference in the maximum punishments prescribed. Criminal statutes "must be

strictly construed." *Prussian v. United States*, 282 U.S. 675, 677, 75 L. ed. 610, 612 (1931). "An ambiguity in such a statute is not to be resolved by an interpretation 'to embrace offenses not clearly within the law.'" *Merrill v. United States*, — F. 2d — (5th Cir. Nov. 24, 1964). See also *Krichman v. United States*, 256 U.S. 363, 367-368, 65 L. ed. 992 (1921). Any doubt must be resolved against broadening the scope of a criminal statute. *United States v. Adielizio*, 77 F. 2d 841, 844 (7th Cir. 1935).

The Supreme Court, in the *Williams* case, buttressed its decision with an exhaustive review of its prior holding pointing out that these decisions had established that the rights which § 241 protects from individual action are those federal rights which arise from relationship of the individual and the Federal Government, for instance, the right to vote in general elections for Congressmen, *Ex parte Yarborough*, 110 U.S. 651, 28 L. 2d. 274 (1884), *Guinn v. United States*, 238 U.S. 347, 59 L. ed. 1340 (1915), *United States v. Mosley*, 238 U.S. 383, 59 L. ed. 1355 (1915), *United States v. Saylor*, 322 U.S. 385, 88 L. ed. 1341 (1944); the right to vote in Louisiana primary elections for Congressmen, *United States v. Classic*, 313 U.S. 299, 85 L. ed. 1368 (1941); the right to establish a claim under the Homestead Acts, this being a right "wholly" dependent upon an Act of Congress, *United States v. Waddell*, 112 U.S. 76, 28 L. ed. 673 (1884); the right of citizens in custody of a United States Marshal to be free from assault, *Logan v. United States*, 144 U.S. 263, 36 L. ed. 429 (1892), and the right to inform on violations of federal laws, *In Re Quarles*, 158 U.S. 532, 39 L. ed. 1080 (1895), *Motes v. United States*, 178 U.S. 458, 44 L. ed. 1150 (1900); and pointing out further that rights, albeit federal rights, which do not arise from the relationship of the individual to

the Federal Government and which arise only by reason of the Fourteenth Amendment's guaranty of protection against action by or on behalf of the States are not covered by § 242, for instance, *United States v. Cruikshank*, 92 U.S. 542, 23 L. ed. 588 (1876), where the defendants under the 4th and 12th counts were charged with having violated § 241, their charged intent being to prevent and hinder citizens of African descent and persons of color in "the free exercise and enjoyment of their several right [sic] and privilege [sic] to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States and then and there, at that time, being in force in the said State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons being citizens of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens", and where the court said:

"The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guaran-

ties [sic] but no more. The power of the National Government is limited to the enforcement of this guaranty."

In the *Williams* case the Supreme Court also relied upon the following cases: *Hodges v. United States*, 203 U.S. 1, 18, 51 L. ed. 65 (1906), holding that the United States has no jurisdiction under the Thirteenth Amendment or under § 241 of a charge of conspiracy by individuals not under color of law to prevent citizens of African descent, because of their race and color, from making or carrying out contracts and agreements to labor and that the effect of the War Amendments was to abolish slavery and to make the emancipated slaves citizens, not wards of the nation, the nation "believing that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the States where they should make their homes," and holding further that "they (members of the African race) took no more from the Amendment (13th) than any other citizen of the United States; *United States v. Wheeler*, 254 U.S. 281, 65 L. ed. 271 (1920), holding that a conspiracy by individuals not under color of law to deprive citizens of the United States of their right to remain in a particular state by seizing them and deporting them to another state, is not a violation of § 241, and that the privilege of passing from state to state is not an attribute of national citizenship, but is one of those privileges which belong by right to the citizens of all free governments distinguishing on the latter point the earlier cases, *Crandall v. Nevada*, 6 Wall. 35, 18 L. ed. 745 (and *Twining v. New Jersey*, 211 U.S. 78, 97, 53 L. ed. 97, 105; *United States v. Powell*, 212 U.S. 564, 53 L. ed. 653, affirming *Per Curiam United States v. Powell*, 151 Fed. 648, holding that participants in a mob which seized a Negro

from the custody of a local sheriff and lynched him were not indictable under § 241 (see *United States v. Williams*, 341 U.S. 70, 95 L. ed. 758); and *Baldwin v. Franks*, 120 U.S. 678, 30 L. ed. 766, holding that a conspiracy to drive *aliens* from their homes is not an offense under § 241, since it is expressly limited to interference with *citizens*.

Of particular interest to this court is the fact pointed out by Mr. Justice Frankfurter in Footnote 8 to the *Williams* case that the indictment in the famous case of *Screws v. United States*, 325 U.S. 91, 89 L. ed. 1495, which originated in this court, contained three counts, count 1 laying a charge under § 241, count 2, under § 242, and count 3, under § 242 in connection with the general conspiracy statute. Count 1 was very much like the indictment at bar, except that it identified two of its three defendants as state officers and went on to charge that these two officers and the third defendant did conspire to injure and oppress a named Negro citizen of the United States and an inhabitant of the State of Georgia in the free exercise and enjoyment of rights, privileges and immunities secured to said Negro citizen by the Constitution and the laws of the United States, to-wit, the right to be secure in his person and to be immune from illegal assault and battery; the right and privilege not to be deprived of liberty and life without due process of law; the right and privilege not to be denied equal protection of the law; the right and privilege not to be subjected to different punishments, pains and penalties by reason of his race and color than are prescribed for the punishment of other citizens; the right and privilege to be tried upon the charge for which he had been arrested by due process of law and, if found guilty, to be sentenced and punished in accordance with the laws

of the State of Georgia; all of said rights, privileges and immunities being secured to the said Negro citizen by the Fourteenth Amendment to the Constitution of the United States as against any person vested with and acting under the authority of the State of Georgia; and then set out the plan and purpose by which the objectives of the conspiracy were to be accomplished. The defendants filed a motion to dismiss or quash each of the three counts, and Judge Bascom S. Deaver signed a memorandum opinion overruling the motions as to counts 2 and 3, but sustaining the motion as to count 1, saying: "section 51 (now 241), as construed by this court was not intended to cover a transaction such as is alleged in the first count." It is significant that the Government did not challenge that ruling as to count 1, although under the Criminal Appeals Act of 1907, 18 U.S.C.A. § 3731, the Government could have secured a review in the Supreme Court. The Government's failure to appeal Judge Deaver's ruling is consistent with its concession in its brief filed in *Hodges v. United States*, *supra*, and quoted in the decision of said case at page 18, which concession, after referring to certain decisions of the Supreme Court, said:

"Within these decisions, and many others that might be cited, before us, it is vain to contend that the Federal Constitution secures to a citizen of the United States the right to work at a given occupation or particular calling free from injury, oppression, or interference by individual citizens.

"Even though such right be a natural or inalienable right, the duty of protecting the citizen in the enjoyment of such right, free from individual interference, rests alone with the State.

"Unless, therefore, the additional element to

wit, the infliction of an injury upon one individual citizen by another, solely on account of his color, be sufficient ground to redress such injury the individual citizen suffering such injury must be left for redress of his grievance to the state laws."

Indeed, the failure to appeal Judge Deaver's ruling is of added significance because Count 1 of the *Screws* indictment alleged that among the rights of which the Negro citizen was to be deprived was "the right and privilege not to be denied equal protection of the laws; the right and privilege not to be subjected to different punishment, pains and penalties by reason of his race and color than are prescribed for the punishment of other citizens."

Two decisions regarding the rights of citizens in reference to labor organizations are of interest and are consistent with the views here expressed. In *United States v. Moore*, 129 Fed. 630 (Circuit Court, N.D. Ala., S.D., 1904), it is held that the right of miners to organize is not a right or privilege coming within § 241, and that the enforcement of such right depends entirely upon the statute. The case of *United States v. Bailes*, 120 F. Supp. 614 (S.D. W. Va. 1954), brings that holding up to date, applying it to the right of citizens to refrain from joining a labor organization even though the National Labor Relations Act, a statute tracing the validity to the Commerce Clause of the Constitution, secures such right as against employers, labor unions, and agents. These cases recognize that these rights of citizens to join or not to join labor organizations are fundamental rights of citizens in all free governments, and the *Bailes* case recognizes the fact that such rights, even though recognized by an Act of Congress, do not become rights of a citizen of the United States as such. See also *United States v. Berke Cake Co.*, 50

F. Supp. 311, E.D. N.Y. (1943), rejecting the Government's attempt to bring within the scope of § 241 the rights of employees recognized by the Fair Labor Standards Act, which, of course, traces its validity to the Commerce Clause.

This court is convinced that the five numerical paragraphs of rights and privileges set forth in this indictment are not federal citizenship rights and privileges; not "federal rights and privileges which appertain to citizens as such", 179 F. 2d at 648, and do not come within the scope of § 241, but are rights and privileges which are in their nature fundamental, and which belong of right to all citizens of all free governments, and which have belonged to all the free citizens of the several states ever since those states became free, independent and sovereign. For a discussion of these fundamental rights and privileges, see *Corfield v. Coryell*, 4 Wash. C.C. 371, and the *Slaughter-House cases*, 16 Wall. 36, 76, 83 U.S. 36, 76, 21 L. ed. 394, 408. Insofar as said five paragraphs of rights and privileges embrace the right to be free from discrimination by reason of race or color, such rights are Fourteenth Amendment rights, which, as we have seen, are not encompassed by § 241. The Government contends that the rights enumerated in paragraph 1 stem from Title 2 of the Civil Rights Act of 1964, and thus automatically come within the purview of § 241. The Government conceded on oral argument that paragraph one would add nothing to the indictment absent the Act. It is not clear how the rights mentioned in paragraph one can be said to come from the Act because § 201(a), upon which the draftsman doubtless relied, lists the essential element "without discrimination or segregation on the ground of race, color, religion, or national origin." This element is omitted from paragraph one of the in-

dictment, and does not appear in the charging part of the indictment. The Supreme Court said in *Cruikshank, supra*, at page 556, where deprivation of right to vote was involved,

"We may suspect that 'race' was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offense and cannot be supplied by implication. Everything essential must be charged positively, not inferentially. The defect here is not in form, but in substance."

The contention as to the rights and privileges specified in paragraphs 2 through 5 is that they are derived from the Fourteenth Amendment, and may be vindicated by prosecutions under § 241. As we have previously seen, this does not follow. Additionally, the Government contends that the rights and privileges set forth in paragraphs 2 and 3 are derived from Title 3 of the Act dealing with public facilities and that the right and privilege described in paragraph 4 is a right arising from the substantive powers of the Federal Government and thus falls within the protection of § 241. We think it clearly appears from the authorities above cited that tracing a right or privilege to the Fourteenth Amendment does not entitle it to coverage under § 241. We think it clear also that the right asserted in paragraph 4 to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of the State in interstate commerce within the State of Georgia is not an attribute of national citizenship. See *Wheeler v. United States, supra*. Travel rights including free ingress to a State and egress therefrom are rights inherent in citizens of all free governments including citizens of all the States and the States have full authority to punish violations of this fundamental right. *United States v. Wheeler, supra*, at

293. These rights were not created, or granted, by the Federal Constitution. Article IV of the Articles of Confederation recognized these rights as belonging to the "free citizens in the several states" and stipulated that "the people of each State shall have free ingress and regress to and from any other State * * *." Article IV, sec. 2 of the Constitution "plainly intended to preserve and enforce the limitation as to discrimination imposed upon the States by Article IV of the Articles of Confederation, and thus necessarily assumed the continued possession by the States of the reserved power to deal with free residence, ingress and egress * * *." *United States v. Wheeler, supra*, at 294. Thus, these ordinary and usual travel rights are not federal citizenship rights and do not become such by virtue of the exercise of the Congressional power to regulate interstate commerce under Article I, sec. 8, of the Constitution. Regulation is not tantamount to creation, and if it were the creation would be for inhabitants and citizens of states generally and not exclusively for citizens of the United States.

Similarly, as we have seen, the Fourteenth Amendment did not create, grant or secure federal citizenship rights. It broadened the base of citizenship. It increased the number of citizens. It did not increase the rights of State citizens or of federal citizens as against other citizens. It made citizens of those who had theretofore not been citizens. The post-bellum Amendments neither separately nor collectively made these new citizens wards of the Federal Government like the Indian tribes, for instance. The Supreme Court has said that members of the African race "took no more from the (13th) Amendment than any other citizen of the United States" and that the emancipated slaves were required by these Amendments to take "their chances with other

citizens in the States where they should make their homes." *Hodges v. United States*, 203 U.S. 1, 18-20, 51 L. ed. 65, 69-70 (1906). As pointed out by the Supreme Court in the *Cruikshank* case in 1876, "the equality of the rights of citizens is a principle of republicanism." Each State is duty bound to protect all its citizens in the enjoyment of this principle of the equality of rights. This right to equality is not a federally created, granted, or secured right. The Fourteenth Amendment merely grants a guaranty against denial of equal protection by the States, and the power of the Federal Government is limited to the enforcement of this guaranty. See *United States v. Cruikshank*, *supra*, at 554.

We feel certain also, as was conceded by the Government on oral argument, that paragraph 5 of the indictment referring to "other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia" contributes nothing toward the validity of the indictment because of the element of vagueness. This matter of vagueness will be discussed later.

Having decided that none of these rights and privileges are federal citizenship rights and privileges, that none of them appertain to federal citizenship as such, we need go no further. We are convinced, however, that the Civil Rights Act of 1964 in no way aids the prosecution. It seems crystal clear that the Congress in enacting the Civil Rights Act of 1964 did not intend to subject anyone to any possible criminal penalties except those specifically provided for in the Act itself. Throughout the Act are provisions for injunctive relief, including restraining orders and temporary and permanent injunctions. Section 1101, in part, reads:

"In any proceeding for criminal contempt arising under title II, III, IV, V, VI, or VII of this Act, the accused, upon demand therefor,

shall be entitled to a trial by jury, which shall conform as near as may be to the practice in criminal cases. Upon conviction, the accused shall not be fined more than \$1,000 or imprisoned for more than six months."

and § 207(b) says:

"The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any Statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right."

The Congress could hardly have made plainer its intention not to bring into play the ninety-four year old ten year felony statute.*

* Senator Humphrey, the leading spokesman for the Civil Rights Act, explained subsection 207(b) in a speech delivered on the floor of the Senate on May 1, 1964, as follows:

"The clause which reads that 'the remedies provided in this Title shall be the exclusive means of enforcing the rights hereby created' is designed to make clear that a violation of sections 201 and 202 cannot result in criminal prosecution of the violator or in a judgment of money damages against him. This language is necessary because otherwise it could be contended that a violation of these provisions would result in criminal liability under 18 U.S.C. 241 or 242 * * *. Thus, the first clause in section [207(b)] simply expresses the intention of Congress that the rights created by Title II may be enforced only as provided in Title II. This would mean, for example, that a proprietor in the first instance, legitimately but erroneously believes his establishment is not covered by section 201 or section 202 need not fear a jail sentence or a damage action if his judgment as to the coverage of Title II is wrong."

Indeed, in the recent case of *Atlanta Motel v. United States*, — U.S. — (Dec. 14, 1964), the Supreme Court, after an analysis of Title II of the Act, concludes that under it "remedies are limited to civil actions for preventive relief."

In the *Williams* case, decided in 1950, the Supreme Court pointed out that these §§ 241 and 242 had in the various codifications been considered by Congress subsequent to their original enactment, not once but four times, without any change in substance, notwithstanding the Court's consistent course of decisions, dating from *Cruikshank* in 1876, indicating that § 241 was in practice interpreted to protect only rights arising from the existence and powers of the Federal Government. Now fourteen years later it can perhaps even more significantly be observed that the Congress, even with the *Williams* decisions before it and in the light of the careful consideration given to the entire subject of civil rights incident to the passage of the Civil Rights Act of 1964, has chosen not to broaden the long standing interpretations of this section. Both of the *Williams* decisions were careful not to question the power of the Congress to enforce by appropriate criminal sanctions every right guaranteed by the Due Process Clause of the Fourteenth Amendment. The question of the power of the Congress under the Constitution to legislate in this field is not here in question. This important matter of "the wise adjustment between State responsibility and national control of essentially local affairs" (341 U.S. 70, 73) is the responsibility of the Congress. The courts are not to invade this field beyond the manifest Congressional intent.

The fact that the *Williams* cases were decided by divided courts, 2 to 1 in the court of appeals, and 5 to 4 in the Supreme Court, and the fact that one of the Supreme Court Justices concurred in the majority

opinion upon grounds other than those expressed in the opinion written by Mr. Justice Frankfurter for the majority, does not militate against the soundness of the views expressed in the majority and controlling opinions. Each of these decisions, though lacking unanimity is a binding precedent upon this court under the familiar doctrine of *stare decisis*.

Moreover, it follows from the *Screws* decision by the Supreme Court and from the *Williams* decision by the court of appeals that any broader construction of § 241 than to cover only federal citizenship rights as such would render it void for indefiniteness.*

The Court of Appeals in *Williams* said:

"The failure (of § 241 to create a crime if such broader interpretation be given it) lies in the application of the statute to the provision of the Fourteenth Amendment, 'Nor shall any State deprive any person of life, liberty, or property, without due process of law,' because of the extreme vagueness of the quoted clause. Reference is made to the discussions of a similar question touching Sec. 20 in *Screws v. United States*, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A.L.R. 1330, wherein by a closely divided court that statute was upheld because it provided that 'wilful' violations only were to be crimes, and that meant that the accused, exercising the power of the State, not only deprived another of a federally secured right, but knew it was such, and wilfully flouted the Constitution and laws of the United States. This indictment does not charge these defendants with 'wilfulness', nor does the statute mention it, and the judge refused to give the jury on request charges that 'wilfulness' was a necessary element of the case.

"2. The Congress and the federal court are themselves faced here with the provision of the

* The Supreme Court did not reach the question of vagueness in the *Williams* case.

Fifth Amendment that 'No person shall * * * be deprived of life, liberty, or property, without due process of law', and it is found right in the midst of provisions in the Fifth and Sixth Amendments about federal prosecutions for crime. It is well understood that 'due process' applies not only to court procedure, but also to legislation, especially in criminal matters. There are no common law federal crimes, but all are created by statute, though common law words in the statute may take their intended meaning from the common law. Not only must the accusation inform the accused for what he is to be tried, but due process requires that the statute must inform the citizen in advance by a reasonably ascertainable standard what the crime shall be. A judge may not establish the standard, save by reasonable interpretation, after the deed is done, for that is in substance to give the statute life *ex post facto*, which the Constitution forbids also. All this we understood to be admitted by all the justices in the opinions in the *Screws* case. The word 'wilful' in Sec. 20 was held by the majority to mean that the accused knew that the federal right existed and intentionally and purposely violated it, and his knowledge and wilfulness made him a criminal." At 647.

The court of appeals held further that while the word "conspire" has some connotation of criminality it does not have the force of the word "wilfully" appearing in § 242, and that it was solely because of the word "wilfully" so appearing that the Supreme Court, in *Screws*, held § 242 valid. The Supreme Court, in *Screws*, recognized that "if the Act falls by reason of vagueness so far as due process of law is concerned, there would seem to be a similar lack of specificity when the privileges and immunities clause * * * and the equal protection clause * * * of the Fourteenth

Amendment are involved." *Screws v. United States*, 325 U.S. 91, 100, 89 L. ed 1495, 1502.*

Certainly all law abiding, liberty loving citizens would feel that if the defendants did what the indictment charges they should be tried, and if, after a fair trial, convicted, that they should be appropriately punished; but the question is by what authority should they be tried, and if, after a fair trial, convicted appropriately punished. The enforcement of general criminal laws is a local matter with authority and responsibility resting squarely and solely upon local city, county, and state governmental authorities. It is common knowledge that two of the defendants, Sims and Myers, have already been prosecuted in the Superior Court of Madison County, Georgia for the murder of Lemuel A. Penn and by a jury found not guilty. As important and desirable as it is that the defendants be tried where not already tried, and if, after a fair trial, convicted that they be appropriately punished, it is equally important that this court not usurp jurisdiction where it has none.

Fortunately, under the Criminal Appeals Act, 18 U.S.C.A. § 3731, the Government has a speedy remedy for a review of this ruling by the Supreme Court, and if it be there adjudicated that this indictment is valid a trial can yet be had.

*This element of vagueness proves fatal to State statutes. For instance, Georgia's insurrection statute, *Herndon v. Lowry*, 301 U.S. 242, 81 L. ed 1066; Georgia's statute against unlawful assemblies for the purpose of disturbing the peace, *Wright v. Georgia*, 373 U.S. 284, 10 L. ed 2d 349. It has had the same effect upon South Carolina's common law crime of breach of the peace, *Edwards v. South Carolina*, 372, U.S. 229, 9 L. ed 2d 697.

Let an order be entered sustaining the defendants' motions to dismiss.

This 29th day of December, 1964.

/s/ W. A. BOOTLE,
United States District Judge.

In the District Court of the United States for the
Middle District of Georgia, Athens Division

Case No. 223

UNITED STATES OF AMERICA

vs.

HENRY GUST, JAMES S. LACKEY, JOHN WILLIAM
MYERS, DEXTER PHILLIPS, JOSEPH HOWARD SIMS
GEORGE HANCOCK TURNER

Final Order

Inasmuch as the memorandum opinion of this Court
dated December 28, 1964, is
concurrent, written and signed that the indict-
ment in the above-captioned case be and the same is
hereby dismissed.

So ordered, this 28th day of January, 1965.

/s/ W. A. BOOTLE

United States District Judge

Presented by:

/s/ Floyd M. Burton

Floyd M. Burton

United States Attorney

(42)

APPENDIX B

In the District Court of the United States for the
Middle District of Georgia, Athens Division

Criminal No. 2232

UNITED STATES OF AMERICA

vs.

HERBERT GUEST, JAMES S. LACKEY, CECIL WILLIAM
MYERS, DENVER PHILLIPS, JOSEPH HOWARD SIMS,
GEORGE HAMPTON TURNER

FINAL ORDER

Pursuant to the memorandum opinion of this Court
dated December 29, 1964, it is

CONSIDERED, ORDERED AND ADJUDGED that the indictment in the above-styled case be and the same is hereby dismissed.

So ORDERED, this the 8th day of January, 1965.

/s/ W. A. BOOTLE,
United States District Judge.

Presented by:

/s/ Floyd M. Buford,
FLOYD M. BUFORD,
United States Attorney.

(42)

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 65

UNITED STATES OF AMERICA, APPELLANT

v.

HERBERT GUEST, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA, ATHENS DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 19-39) is unreported.

JURISDICTION

The judgment of the district court was entered on January 8, 1965 (R. 40). Notice of appeal was filed on January 27, 1965. On June 1, 1965, this Court entered an order postponing decision of the question of jurisdiction to the hearing on the merits (R. 45). The jurisdiction of this Court is invoked under 18 U.S.C. 3731.¹

¹ Insofar as there is a jurisdictional question with respect to one part of the case, it is discussed at pp. 62-66, *infra*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution:

ARTICLE I.

SECTION 8. The Congress shall have Power
 * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

* * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Statutes:

18 U.S.C. 241

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than \$5,000 or imprisoned not more than ten years, or both.

CIVIL RIGHTS ACT OF 1964

(42 U.S.C. 2000a, *et seq.*)

SEC. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

SEC. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

SEC. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive, or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for

exercising or attempting to exercise any right or privilege secured by section 201 or 202.

SEC. 204. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

* * * * *

SEC. 207. (b) The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

QUESTIONS PRESENTED

1. Whether Section 241 of the Criminal Code reaches private conspiracies against the exercise of rights secured by the Equal Protection Clause of the Fourteenth Amendment.

2. Whether Section 241 reaches conspiracies against the exercise of the rights to travel freely to and from any State and to use the instrumentalities of interstate commerce.

3. Whether Section 241 reaches conspiracies against the exercise of rights secured by Title II of the Civil Rights Act of 1964.

STATEMENT

On October 16, 1964, the United States Grand Jury for the Middle District of Georgia returned an indictment (R. 1-2) charging six individuals with engaging in a criminal conspiracy in violation of 18 U.S.C. 241. None of the defendants was alleged to hold public office or to be acting "under color of law." The objects of the conspiracy were alleged to be—

* * * to injure, oppress, threaten and intimidate Negro citizens of the United States in the vicinity of Athens, Georgia, in the free exercise and enjoyment by said Negro citizens of the following rights and privileges secured to them by the Constitution and laws of the United States:

1. The right to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of motion picture theaters, restaurants, and other places of public accommodation;

2. The right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof;

3. The right to the full and equal use on the same terms as white citizens of the public streets and highways in the vicinity of Athens, Georgia;

4. The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia;

5. Other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia.

The indictment particularized the means by which the conspirators planned to achieve their goal, which included beatings, shootings, killings, and other acts of violence against the persons and property of Negroes.

The defendants moved to dismiss the indictment on the ground that it did not charge an offense under the laws of the United States (R. 13, 18). The district court sustained the motion and dismissed the indictment as to all defendants (R. 40).

Following the court of appeals decision in *Williams v. United States*, 179 F. 2d 644 (C.A. 5), affirmed partly on other grounds, 341 U.S. 70, the district court held that 18 U.S.C. 241 does not punish an invasion of rights secured by the Fourteenth Amendment—the only rights alleged by the indictment, in the court's view (R. 19-32). That ruling made it unnecessary to

consider separately the further question whether wholly private conspiracies directed at Fourteenth Amendment rights are within the constitutional reach of Section 241. Focusing on paragraph 4 of the indictment—which alleges interference with interstate travel and the use of interstate facilities—the district court concluded that no right of national citizenship was there stated (R. 33). And it likewise rejected the contention that Titles II (public accommodations) and III (public facilities) of the Civil Rights Act of 1964 created federal rights that might be vindicated by a criminal prosecution under 18 U.S.C. 241 (R. 34-35).²

SUMMARY OF ARGUMENT

The indictment (in one count) charges the same group of individuals (none of whom are alleged to be holding public office or to be acting under color of law) with engaging in a single conspiracy generally directed at preventing Negroes from exercising or enjoying their civil rights, in violation of Section 241 of the Criminal Code. But those rights, in turn, fall into three separate categories, each derived from a different source and involving distinct legal questions. Accordingly, we treat separately the reach of Section 241 with respect to private conspiracies interfering with (1) rights grounded in the Equal Protection

² The district court also ruled that paragraph 5 of the indictment (alluding to "other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia") was so vague and indefinite as to contribute "nothing toward the validity of the indictment" (R. 34). We acquiesced in that ruling below and do not challenge it here.

Clause of the Fourteenth Amendment—specifically, the right to the “equal utilization, without discrimination upon the basis of race, of public facilities * * * owned, operated or managed” by the State, including the “public streets and highways,” mentioned in the second and third numbered paragraphs of the indictment; (2) the right to travel freely to and from any State and the right to use the instrumentalities of interstate commerce—recited in the fourth numbered paragraph of the indictment; and (3) the right to the equal advantages of restaurants, motion picture theaters and other privately owned places of public accommodation, guaranteed by Title II of the Civil Rights Act of 1964 (alleged in the first numbered paragraph of the indictment).

I

The right to the non-discriminatory use of public facilities owned or operated by the State itself is one grounded in the Equal Protection Clause of the Fourteenth Amendment. In light of *United States v. Williams*, 341 U.S. 70, the threshold question with respect to this branch of the case is whether Section 241 protects Fourteenth Amendment rights at all. For an affirmative answer on that issue, we rely upon our brief in *United States v. Price*, Nos. 59 and 60, this Term. We then turn to the text and legislative history of Section 241 to show that it was meant to reach private individuals acting in conspiracy, and, applying the strict requirements of *Screws v. United States*, 325 U.S. 91, we conclude that, so construed, the statute is not impermissibly vague.

The more basic question is whether there is congressional power to reach private action interfering with the enjoyment of a right guaranteed by the Equal Protection Clause. Confining our argument to activities in which the State is directly involved—here, the operation of its own facilities—we find authorization for such legislation in Section 5 of the Fourteenth Amendment, empowering Congress to “enforce” the guarantees of Section 1 “by appropriate legislation.” There is, we show, no obstacle in the text of the Equal Protection Clause, which, while it may command equality only in a limited area, does not foreclose any means which Congress may reasonably think necessary to achieving that end. That conclusion, we suggest, is compelled by the indications of the purpose of the framers of the Amendment—the evidence of private oppression submitted to the drafters and the subsequent legislation enacted by congressmen, many of whom had participated in framing the Amendment. We also find support for this construction in the first judicial decisions under the Amendment, by judges immediately familiar with its history. Finally, while acknowledging that there are statements in subsequent opinions of the Court which point the other way, we show that no decision here forecloses our submission.

II

The right to pass freely from State to State and the right to use the instrumentalities of interstate commerce

are, we submit, "rights which arise from the relationship of the individual to the Federal Government," and, as such, are protected as against private interference by Section 241—even accepting the narrowest construction of that statute. The first of those rights is not expressly granted by the Constitution, but inheres in the structure of the federal Union, as decisions of this Court have repeatedly recognized. The bare right to unhampered use of the instrumentalities of interstate commerce is, we suggest, conferred by the Commerce Clause itself, even without implementing legislation.

III

On its face, the right to non-discriminatory service by privately owned places of public accommodation—now guaranteed by Title II of the Civil Rights Act of 1964, enacted under the commerce power—seems plainly a right protected by Section 241 against conspiracies. The only question is whether the exclusive-remedy provision of the 1964 Act confines enforcement of the new right to proceedings for injunctive relief and bars a criminal prosecution in all circumstances. We think not. The benevolent policy of the Act with respect to businessmen under economic pressure has no application to a case like this one, involving terrorists, unconnected with any establishment, who act from malice and against whom a "civil action for preventive relief" is plainly inadequate.

ARGUMENT

I

SECTION 241 REACHES UNOFFICIAL CONSPIRACIES AGAINST
THE EXERCISE OF RIGHTS SECURED BY THE EQUAL PRO-
TECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The indictment alleges a conspiracy by private persons—not claimed to be holding public office or acting under color of State law—forcibly to prevent Negroes, because of their race, from enjoying, equally with whites, among other rights, the benefits of public facilities owned or operated by the State, including the local public streets and highways. That is, of course, a right protected by the Fourteenth Amendment's command of equality—whether it relates to schools,⁸ parks and playgrounds,⁹ golf courses,⁵ beaches,⁶ municipal auditoriums,⁷ courthouses⁸ and other public buildings,⁹ or the city streets.¹⁰ Indeed, it has its only source in the

⁸ *Brown v. Board of Education*, 347 U.S. 483; *Cooper v. Aaron*, 358 U.S. 1; *Orleans Parish School Board v. Bush*, 365 U.S. 569, 366 U.S. 212, 367 U.S. 907, 908, 368 U.S. 11; *St. Helena Parish School Board v. Hall*, 368 U.S. 515; *Goss v. Board of Education*, 373 U.S. 683; *Griffin v. School Board*, 377 U.S. 218.

⁹ *New Orleans Park Ass'n. v. Detiege*, 358 U.S. 54; *Wright v. Georgia*, 373 U.S. 284; *Watson v. Memphis*, 373 U.S. 526; *City of New Orleans v. Barthe*, 376 U.S. 54.

⁷ *Holmes v. City of Atlanta*, 350 U.S. 879; *New Orleans Park Ass'n. v. Detiege*, *supra*.

⁶ *Mayor and Council of Baltimore v. Dawson*, 350 U.S. 877;

⁵ *Muir v. Louisville Park Theatrical Ass'n.*, 347 U.S. 971.

⁴ *Johnson v. Virginia*, 373 U.S. 61.

³ *Burton v. Wilmington Parking Authority*, 365 U.S. 715; *Turner v. City of Memphis*, 369 U.S. 350.

¹⁰ Cf. *Gayle v. Browder*, 352 U.S. 903.

Equal Protection Clause.¹¹ Accordingly the validity of the indictment in this respect depends upon whether Section 241 of the Criminal Code reaches unofficial conspiracies directed at blocking specific rights secured by the Fourteenth Amendment.

The major question is one of the constitutional power of Congress: Does the Fourteenth Amendment authorize punitive legislation bearing directly against individuals to "enforce" the rights secured by the Equal Protection Clause? Before we reach that inquiry, however, there are preliminary questions of statutory construction to which we first turn.

A. THE QUESTIONS OF STATUTORY CONSTRUCTION

1. *Section 241 was intended to protect Fourteenth Amendment rights*

At the threshold is the contention—upheld below—that Section 241 does not encompass Fourteenth Amendment rights at all. That question was left unresolved by an evenly divided Court in *United States v. Williams*, 341 U.S. 70, and is now before the Court in *United States v. Price*, Nos. 59 and 60, this Term. For the reasons stated by Mr. Justice Douglas for four members of this Court in *Williams*

¹¹ That is not to say that the right in question is not implemented by statutes other than 18 U.S.C. 241. On the contrary, it is clearly encompassed by the general civil rights statutes providing for civil relief, now Sections 1983 and 1985 of Title 42 of the United States Code, and is more particularly recognized in Title III of the Civil Rights Act of 1964. But those enactments, insofar as here relevant, merely enforce the guarantee of the Equal Protection Clause of the Fourteenth Amendment.

(see 341 U.S. at 90-93) and discussed in our brief in *Price* (see pp. 12-28), we believe rights secured by the Fourteenth and Fifteenth Amendments are within the scope of Section 241. To be sure, *Williams* and *Price* both involve *due process* rights, whereas the present indictment charges interference with rights secured by the *Equal Protection Clause* of the Fourteenth Amendment. But no one has suggested a basis, and none appears, for concluding that Section 241—if it encompasses Fourteenth Amendment rights at all—protects rights secured by the one clause but not those guaranteed by the other. Our argument in *Price* is fully applicable here and need not be repeated.¹² The further question in the present case is whether the provision reaches private action designed to defeat the implementation of those rights.

2. *Section 241 was intended to protect Fourteenth Amendment rights against private conspiracies*

Once it is settled that a right declared by the Fourteenth Amendment is a “right or privilege secured * * * by the Constitution” within the meaning of Section 241, there is, in truth, no remaining question of statutory construction. The language of the

¹² It does not necessarily follow, however, that Section 241 reaches *unofficial* conspiracies directed against the exercise or enjoyment of due process rights; the present brief is confined to the proposition that the section may constitutionally reach private group action directly interfering with the exercise of certain specific rights guaranteed by the Equal Protection Clause. Because, as we show below, the same rationale applies, we conclude that Section 241 also encompasses private interference with the right secured by the Fifteenth Amendment.

provision is plainly broad enough to cover wholly "private"¹³ conspiracies: the crime may be committed by any "two or more persons," whether or not holding public office or acting "under color of law." *Ex parte Yarbrough*, 110 U.S. 651; *United States v. Waddell*, 112 U.S. 76; *Logan v. United States*, 144 U.S. 263; *In re Quarles*, 158 U.S. 532; *Motes v. United States*, 178 U.S. 458; see *United States v. Classic*, 313 U.S. 299, 315.

Nor is there any doubt that those who enacted Section 241 meant to reach so far. Senator Pool of North Carolina, in sponsoring the amendment that was to become Section 6 of the Enforcement Act of 1870—and, ultimately, Section 241 of the Criminal Code¹⁴—reiterated his preoccupation with private conspiracies. Indeed, in his view, one of the principal virtues of his proposal was that it reached individuals acting in conspiracy who held no official powers. As he said (Cong. Globe, 41st Cong., 2d Sess., p. 3611):

* * * individuals may prevent the exercise of the right of suffrage; individuals may prevent the enjoyment of other rights which are con-

¹³ We use the term "private conspiracies" in the brief as a convenient shorthand to describe the conspirators as private individuals who neither hold public office nor act under color of law. We do not mean to so characterize the purpose or object of the conspiracy, which is, of course, far from "private", affecting, as it does, the right to enjoy public facilities owned or operated by the State itself.

¹⁴ We have traced the history of Section 241 in the companion case of *United States v. Price*, Nos. 59 and 60, this Term. See Brief for the United States, pp. 15-28.

ferred upon the citizen by the fourteenth amendment, as well as trespass upon the right conferred by the fifteenth. Not only citizens, but organizations of citizens, conspiracies, may be and are, as we are told, in some of the States formed for that purpose.

And, again, asserting the propriety of the legislation, Senator Pool said (*id.*, p. 3613):

* * * That the United States Government has the right to go into the States and enforce the fourteenth and the fifteenth amendments is, in my judgment, perfectly clear, by appropriate legislation that shall bear upon individuals. I cannot see that it would be possible for appropriate legislation to be resorted to except as applicable to individuals who violate or attempt to violate these provisions. Certainly we cannot legislate here against States. As I said a few moments ago, it is upon individuals that we must press our legislation. It matters not whether those individuals be officers or whether they are acting upon their own responsibility; whether they are acting singly or in organizations. If there is to be appropriate legislation at all, it must be that which applies to individuals.

The fact is that Section 241 had its "source * * * in the doings of the Ku Klux and the like," as Mr. Justice Holmes noted for the Court in *United States v. Mosley*, 238 U.S. 383, 387. It was intended to reach all their works, including interference with the rights recently declared by the Fourteenth Amendment. Here "Congress put forth all its powers." *Ibid.* The only question is whether the statute, so con-

strued, overreaches the constitutional power of Congress because the Fourteenth Amendment is in terms addressed to the States alone.

3. *So construed, Section 241 is not impermissibly vague*

Before turning to the ultimate question of congressional power, we pause to consider the objection that construing Section 241 to reach private conspiracies directed against Fourteenth Amendment rights would render it too vague and indefinite for a criminal statute. That question, it seems to us, is fully answered by *Screws v. United States*, 325 U.S. 91, and the opinion of Mr. Justice Douglas for four members of the Court in *United States v. Williams*, 341 U.S. 70, 93-95.

The decision in *Screws* announces two requirements for a criminal provision generally enforcing the Due Process or Equal Protection guarantees of the Fourteenth Amendment: (1) That it operate only against an offender acting with specific intent to infringe the right in question, and (2) that the right protected have been "made definite by decision or other rule of law." Both conditions are satisfied here. As Mr. Justice Douglas pointed out in *Williams, supra*, Section 241 meets the first requirement by virtue of being a conspiracy statute: the provision does not punish merely causing or permitting an injurious result, by negligence or otherwise, but only the purposeful agreement to inflict the injury. Vagueness is not imparted because the statute reaches private conspiracies, else it could never serve its most traditional function. See,

e.g., *Ex parte Yarbrough*, 110 U.S. 651; *United States v. Waddell*, 112 U.S. 76; *Logan v. United States*, 144 U.S. 263; *In re Quarles*, 158 U.S. 532; *Motes v. United States*, 178 U.S. 458. Whether it operates against conspiracies directed against a Fourteenth Amendment right or conspiracies to obstruct the enjoyment of another "right or privilege secured * * * by the Constitution or laws of the United States," Section 241 reaches only direct, purposeful interference with its exercise or enjoyment. The true scope of the statute is illustrated by the present indictment which alleges a deliberate conspiracy of violence and terror explicitly designed to prevent or deter Negroes, on account of their race alone, from enjoying the benefit of public facilities owned or operated by the State. Properly confined by appropriate instructions guarding against conviction for equivocal conduct remotely related to the right involved, there is no vagueness in that charge.

To be sure, Section 241 is not, on its face, expressly restricted to constitutional rights which have been "made definite by decision or other rule of law." But neither is Section 242 so construed in *Screws v. United States*, *supra*, and *Williams v. United States*, 341 U.S. 97. As Mr. Justice Douglas noted in *United States v. Williams*, 341 U.S. 70, 94-95, the same considerations dictate a similar reading of both statutes. Certainly the present indictment describes specific and indisputable rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment. We have already noted the decisions in this

Court which definitively establish the right to non-discriminatory enjoyment of public facilities owned or operated by the State. See notes 3-10, *supra* p. 11. The matter is "no longer open". *Johnson v. Virginia*, 373 U.S. 61, 62. Indeed, the right is now expressly recognized by federal legislation authorizing the Attorney General to institute legal proceedings to open State facilities to nondiscriminatory use. Civil Rights Act of 1964, § 301, 42 U.S.C. 2000b.

We conclude that Section 241 must be read as protecting specific rights secured by the Equal Protection Clause of the Fourteenth Amendment against private conspiracies unless that construction overreaches the constitutional power of Congress. We now turn to that question.

B. THE QUESTION OF CONSTITUTIONAL POWER

Our submission is that Congress is empowered to implement the right of Negroes to enjoy, equally with others, the benefits of State-owned or State-operated public facilities by punishing those who interpose themselves to prevent it, although the offenders be private individuals who neither hold public office nor act under color of law. That seems to us wholly "appropriate legislation" authorized by the Fifth Section of the Fourteenth Amendment to "enforce" a right guaranteed by the Equal Protection Clause of the Amendment's First Section. Indeed, in the circumstances outlined by the indictment—a conspiracy of violence directed against Negroes on account of

their race, designed to terrorize them out of asserting their undoubted right to use the public facilities furnished by the State—it offers the only practical remedy; by hypothesis, the State itself is not actively engaged in discrimination which calls for injunctive relief and (assuming federal power exists) it is not normally possible to compel the State to halt the interference, even if it has the means.

Given the prevalence of these conditions at the time of the framing of the Fourteenth Amendment and the obvious advantages of this solution over the more destructive alternatives—federal military intervention or congressional dictation of adequate State laws and supervision of their enforcement—it would be surprising if those who wrote the Amendment had not meant to empower Congress to reach private conspiracies dedicated to defeating the realization of the new equality that was now held out to the Negro. This is not to deny that there are statements in decisions of this Court which apparently point the other way. See *United States v. Harris*, 106 U.S. 629, 638–640; *Civil Rights Cases*, 109 U.S. 3, 11–19. See, also, *United States v. Cruikshank*, 92 U.S. 542, 554; *Virginia v. Rives*, 100 U.S. 313, 318; *James v. Bowman*, 190 U.S. 127, 139 (Fifteenth Amendment). However, as we point out below (pp. 46–52), they are not controlling here.

Our position, we stress, involves no radical re-interpretation of the Fourteenth Amendment. The doctrine of “State action” is a bar only if it is understood as invariably restricting the operation of the

Equal Protection Clause—and the power of Congress to enforce it—to situations in which the State, through its agents, is guilty of active discrimination, and as confining all remedies—whether fashioned by courts or embodied in legislation—to those that expend themselves directly on the State or its agents. That narrow rule, we suggest, does not accurately measure the scope of the congressional power to enforce the Fourteenth Amendment in circumstances like those alleged here; nor do we think it compelled by any decision in this Court.

Moreover, our argument does not touch the bundle of rights embraced in the Due Process Clause. There, the “State action” concept may be wholly appropriate to confine legislation within constitutional limits and the effort to control individual conspiracies might involve a risk of supervening (or duplicating) a large part of the municipal law of the States. See *United States v. Cruikshank*, *supra*, 92 U.S. at 553–554; *Civil Rights Cases*, *supra*, 109 U.S. at 13, 14–15. But there is no such problem here. Section 241, as we construe it, does not punish every crime against the local peace; nor would a comparable civil provision reach every tort. Even anti-racial assaults, prompted by discriminatory motives, are outside our argument unless they involve a specific intent to create or perpetuate an inequality in the relations between the individual and the State.

Nor does our approach challenge familiar boundaries to bring the command of equality to new territory. We make no claim based on some tenuous

theory of State involvement. Much less do we argue that discrimination in certain private activities is constitutionally reachable because the State has constitutional power to end it and has defaulted. Our case is not in a borderline zone where inequalities may be viewed as matters which the Constitution leaves to State regulation or to private choice. We are, indeed, at the core of the area governed by the Equal Protection Clause: the State's own facilities are involved and it is the right to enjoy them equally that is sought to be enforced.

Finally, our argument does not suggest the intrusion of federal sanctions against individual acts when the State is clearly able and willing to deal with them. To be sure, federal jurisdiction, if otherwise proper, is not usually ousted because the State offers its own remedy. *McNeese v. Board of Education*, 373 U.S. 668; *Monroe v. Pape*, 365 U.S. 167. Yet, the necessity for national solutions is always relevant to the appropriateness of congressional intervention in the zone of concurrent State jurisdiction. As we construe it, Section 241 governs individual conduct only when the State (whether or not at fault) has defaulted, or at least, is in danger of defaulting, in effecting equality in an area where the Constitution commands it. That is not to say that application of the federal sanction depends, in each case, upon the existence and sufficiency of local remedies in the particular community. Section 241 imposes no such impractical condition. But the statute is, nevertheless, premised on a congressional finding—reasonable then

as now—that the States could not, or would not, effectively remove a practical barrier to the enjoyment of constitutional rights.

It is proper to emphasize that the federal statute does not deal with the isolated act of a single individual, but a conspiracy, typically violent, more dangerous and more likely to succeed. As a practical matter, at least in the area of public facilities, such conspiracies are formed to *perpetuate* a State default and survive only when the State itself cannot or will not suppress them. That is, of course, especially true of racial discrimination, as to which no one can gainsay the need for national action, in 1870 or today. Indeed, insofar as it operates against individuals interfering with rights secured by the Equal Protection Clause, it may be appropriate to confine Section 241 to cases of invidious discrimination against an identifiable class (see *Snowden v. Hughes*, 321 U.S. 1), or even to discrimination against the Negro, the special beneficiary of the Fourteenth Amendment. See *Slaughter-House Cases*, 16 Wall. 36, 81; *Strauder v. West Virginia*, 100 U.S. 303, 306–307.

Such is the burden of our argument. We now turn to the several considerations which sustain the conclusion that Congress was empowered by the Fifth Section of the Fourteenth Amendment to enforce the Equal Protection Clause as we think it did in Section 241.

1. *The text of the Equal Protection Clause, read in conjunction with the Fifth Section of the Fourteenth Amendment, authorizes legislation reaching private conspiracies*

Even without a special delegation of authority, Congress has inherent power to implement, by positive legislation, a right granted or secured by the Constitution. See *Strauder v. West Virginia*, 100 U.S. 303, 310-311. That was settled in the decisions upholding the Fugitive Slave Acts of 1793 and 1850 (*Prigg v. Pennsylvania*, 16 Pet. 539; *Ableman v. Booth*, 21 How. 506), and it is the necessary assumption of the cases sustaining federal legislation protecting the right to vote in Presidential elections—which the Constitution does not expressly empower Congress to regulate. *Burroughs and Cannon v. United States*, 290 U.S. 534. See, also, *Ex parte Yarbrough*, 110 U.S. 651, 658. But the matter was not left in doubt with respect to the Fourteenth Amendment. Section 5 expressly empowers Congress “to enforce” the guarantees “by appropriate legislation,” including, of course, the right to “equal protection of the laws.”

What is the scope of the power given? In the landmark case of *Ex parte Virginia*, 100 U.S. 339, 345-346, this Court generally defined the breadth of enforcement sections of the three post-War Amendments:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and

to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

With specific reference to enforcement of the guarantee of the Equal Protection Clause, it has been said that Congress may adopt any "appropriate mode of * * * securing * * * the enjoyment of the right," and that "[t]he form and manner of the protection may be such as Congress in the legitimate exercise of its legislative discretion shall provide." *Strauder v. West Virginia*, *supra*, 100 U.S. at 310-311. In short, the power to enforce here would seem to be fully as broad as under the "necessary and proper" clause of the original Constitution (see *McCulloch v. Maryland*, 4 Wheat. 316, 420; *Atlanta Motel v. United States*, 379 U.S. 241, 255) or the enforcement clause of the other amendments. See, *e.g.*, *Everard's Breweries v. Day*, 265 U.S. 545, 558-559.

In sum, the power of Congress is not narrowly confined. Here, as elsewhere, congressional enforcement goes beyond the self-operative scope of the Constitution. The Equal Protection Clause "derive[s] much of [its] force" from the provision authorizing Congress to enforce it. *Ex parte Virginia*, *supra*, 100 U.S. at 345, 347-348. Just as statutes implementing the Commerce Clause may reach *intrastate* activities that affect interstate commerce (*e.g.*, *Atlanta Motel v. United States*, *supra*), and legislation carrying into effect the Eighteenth

Amendment's prohibition on the sale of intoxicating liquors for *beverage* purposes could regulate the dispensation of alcohol for *medicinal* uses (*Everard's Breweries v. Day, supra*), so, here, it would seem that Congress has power to outlaw all direct interference with the enjoyment of equal protection of State laws, from whatever source it might come—even though the Equal Protection Clause itself, *ex proprio vigore*, may inhibit State action alone. Unless the right itself is very narrowly circumscribed, it is difficult to appreciate why Congress cannot protect it against private conspiracies—in the same way that the right to vote in congressional elections or the right to establish a homestead on federal land is protected. See, *Ex parte Yarbrough*, 110 U.S. 651; *United States v. Waddell*, 112 U.S. 76.

The words of the Equal Protection Clause are: "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." We now examine that text as it bears on the power of Congress to legislate under Section 5 of the Amendment, asking, in turn, (a) *what* is the nature of the right secured; (b) *where* does the guarantee operate; (c) *when* does the enforcement power come into play; and finally, (d) *how* may it be exercised and against *whom*.

a. It is axiomatic that Congress can only "enforce" the right secured; hence, we must look to the Equal Protection Clause itself to see what is guaranteed. Though framed as an injunction, it is clear that the provision confers "positive rights" on individuals (*Civil Rights Cases*, 109 U.S. 3, 11), for "every pro-

hibition implies the existence of rights and immunities." *Strauder v. West Virginia*, 100 U.S. 303, 310. Nor do the words imply an exemption or immunity only. "No State shall deny" plainly means "every State shall grant," and, of course, "the beneficiaries shall enjoy." See *Neal v. Delaware*, 103 U.S. 370, 386. The correct analysis of the Equal Protection Clause, it seems to us, is that given of the similarly worded Fifteenth Amendment by Mr. Justice Bradley, sitting on circuit in *United States v. Cruikshank*, 1 Woods 308, 321, 25 Fed. Cas. 707, 712:

The language is peculiar. It is composed of two negatives. The right shall *not be denied*. That is, the right *shall be enjoyed*; * * *.

What, then, is the right that everyone shall enjoy? The words "equal protection of the laws" may be read as suggesting that the provision, first, guarantees some measure of legal protection to all persons, and, second, commands that the kind and degree of protection afforded shall be the same for everyone. Indeed, it has been persuasively argued that such was the intent of the framers. tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (1951), pp. 96-98, 192-206, 221-222. But, whether or not protection and equality are separately guaranteed, the Clause at least intends to assure that the protection of the law shall not be withheld from some while it is given to others. That may well impose an affirmative obligation on the States in some circumstances to take action against private conspiracies directed at a class in the community that would otherwise go unprotected—and, if

the State default (whether or not from inability), federal intervention may be authorized. See 10 U.S.C. 333. In any event, the insertion of the word "protection" makes it clear that the provision guarantees more than equal laws. The concern is with practical equality in legal relations. There is "a practical denial" of equal protection when a law "fair on its face and impartial in appearance" is administered "with an evil eye and an unequal hand." *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374. So, also, equal protection is withheld when a class of citizens is forcibly prevented from enjoying the benefits of a fair law.

The principle is fully applicable to our case. The Equal Protection Clause enjoins the State to open its facilities to all, without distinction on account of race or color, and to give equal treatment there. That is no more than the requirement of an equal law. But the beneficiaries still have a claim to practical protection in the enjoyment of that "law." At least with respect to its own facilities, the State cannot "abdicate its responsibilities" and permit inequality to flourish through its "inaction." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725. In short, the right involved here is the equal opportunity to enjoy the State's facilities, the right of Negroes to approach and enter—not merely an immunity from discriminatory treatment at the hands of State officials once they are inside.

b. The Equal Protection Clause grants equality and a right to be protected in its enjoyment. But that

promise is not without limits. We now consider the area within which the guarantee operates.

It is immediately apparent that the provision does not govern all relationships, but only those in which the State is involved. The outer perimeter of its concern is the area of conduct regulated by "law", and, even then, the Clause operates only in the relatively narrow zone where there are direct contacts between the "State" and the inhabitant "within its jurisdiction," typically the area of public law—criminal proceedings, taxation, business regulation, the distribution of public benefits and the use of State facilities. There is a wide range of activities to which the Equal Protection Clause has no application, at least so long as the State does not intrude. In this sense, the provision "does not * * * add anything to the rights which one citizen has under the Constitution against another" (*United States v. Cruikshank*, 92 U.S. 542, 554-555): "Individual invasion of individual rights is not the subject-matter of the amendment." *Civil Rights Cases*, 109 U.S. 3, 14.

That, it seems to us, is the basic limitation of the Equal Protection Clause: it is concerned only with activities in which the State (through its officers) is a party. Even Congress, exercising its enforcement power cannot expand the scope of the provision in this respect. Such is the holding of the *Civil Rights Cases*, *supra*, invalidating the Civil Rights Act of 1875 which sought to assert federal jurisdiction over privately owned places of public accommodation, and of *Hodges v. United States*, 203 U.S. 1,

repudiating an effort to extend Section 241 of the Criminal Code to protect private contracts of hire. Whatever the viability of those decisions in the changed circumstances of today, there is no comparable problem here. Our case—involving enjoyment of the State's own facilities—falls squarely within the subject-matter of the Amendment.

In short, the Equal Protection Clause states the nature of the right guaranteed—protected equality—and defines the area of constitutional concern—State activities. The rest, it would seem, is left to Congress, empowered by Section 5 of the Amendment to “enforce” the guarantee by “appropriate legislation.”

c. We pursue the analysis, however, because, focusing on the words “No State shall * * * deny,” it has been intimated that the congressional power comes into play only to “correct” hostile State action, and, therefore, after the fact. See *Civil Rights Cases*, *supra*, 109 U.S. at 13. As applied to our case, the argument would be that Section 241 reaches too far by checking private acts at a time when the State and its agents have taken no affirmative steps to “deny” the right guaranteed by the Equal Protection Clause. In our view the words announce no such limitation on the power of Congress.

We have already shown that the guarantee is more than a grant of immunity from State imposed discrimination: What is promised is equality of enjoyment and equality of protection within the area affected by the Equal Protection Clause, which the State “denies” when it does not accord it, whatever

the cause. Thus, if the State is unwilling or unable to establish that equality, Congress is free to act although the State itself has taken no hostile action.

The fact is that the notion of congressional power restricted to a reaction to State action developed out of cases very different from ours. It may be the necessary rule for an area of activity which the State does not regulate, for, then, until its officers intervene, the Equal Protection Clause has no application. But there can be no comparable condition when—as with respect to its own facilities—the State is already necessarily involved. Here the right to equality is fully ripened and congressional protection need not await the development of a relationship between the State and the individual: that relationship already exists.

d. The final question is *how* Congress may implement the right secured by the Equal Protection Clause, and, specifically, against whom it may legislate. Because the Equal Protection Clause is, in terms, addressed to the States, it might be supposed that all remedies must bear directly on the State in default. But that is not a necessary reading, nor even the most natural.

That the Equal Protection Clause speaks directly to the States is, of course, directly attributable to the preoccupation with the relationship between the inhabitant and his government. The form of address used delimits the area involved and places primary responsibility where it belongs—on the States. Another consequence of the wording may be that only

the State has capacity to violate the Equal Protection Clause, in the strict sense, and that the unimplemented provision expends itself on the State alone. But there is here no restriction on the means Congress may employ to correct or prevent a State default and right the constitutional wrong. Private individuals may be reached, not because they themselves violate the Constitution, but because they effectively perpetuate or cause a denial of equal protection by the State.

On reflection, it becomes clear that the Equal Protection Clause cannot be read literally as authorizing only an injunction to accord the benefit discriminatorily withheld. For that is seldom a practical solution. The Constitution speaks directly to States, but Congress must find another way of protecting the right which the State will not or cannot effectuate. Thus, from the beginning, the remedy for denial of the right to a nondiscriminatory jury was not to order the State to accord the defendant an impartial jury, but to vacate his conviction (*Strauder v. West Virginia*, 100 U.S. 303), or to remove his case to a federal court (*id.*), or, finally, to punish the offending official (*Ex parte Virginia*, 100 U.S. 339; see, also, 18 U.S.C. 242). In other cases, the Equal Protection Clause is "enforced", not by correcting the immediate constitutional wrong, but by awarding damages to the injured party. *E.g.*, *Nixon v. Herndon*, 273 U.S. 536; see 42 U.S.C. 1983, 1985(3), 1986. Nor does the remedy always run against the State itself or even against the State officer guilty of discriminating.

Indeed, over strong dissents (Holmes, J., in *Raymond v. Chicago Traction Co.*, 207 U.S. 20, 41; Frankfurter, J., in *Snowden v. Hughes*, 321 U.S. 1, 13, 16-17; Roberts, J., in *Screws v. United States*, 325 U.S. 91, 138-148), it is now settled that an official can be held responsible for violating the Fourteenth Amendment even though his conduct contravenes the authentic command of the State—itsself guiltless. See *Monroe v. Pape*, 365 U.S. 167. And, except for cases involving criminal liability or accountability in damages, the remedy does not seek out the offender, but, rather, the officer of the State with power to restore constitutional equality. We need only remember that when the State legislators have enacted a discriminatory law, the enforcement of the Equal Protection Clause ignores them and operates against those charged with executing it, however innocent they may be.

To be sure, in most of these cases, the remedy runs against a State officer or a person acting "under color" of State law. But, assuming a constitutional wrong by the State, that is not a necessary condition of relief. The principle is illustrated by the case of removal, which does not bear against the State. And, in truth, the punishment of a State officer who abuses his power, even violates State law, is not a penalty imposed on the State: when he is treated as a criminal, the officer is viewed as a mere individual, no longer an agent of the State.

To deny congressional power to deal effectively with conspiracies aimed at intimidating the beneficiaries of the Fourteenth Amendment into refraining from

the exercise of the rights there declared is to reduce the guarantees of that Amendment (and the Fifteenth, also) to empty exhortations whenever unofficial pressures are interposed between the citizen and his State government, which preserves its clean hands, unable or unwilling to interfere. It is difficult to suppose that those who wrote the Equal Protection Clause meant to confer upon Congress no power whatever to deal with so obvious a barrier to the practical implementation of the newly established constitutional right. That would be inviting vigilantism by putting racists on notice that, if they offered resistance to the enjoyment of these rights, not under color of law but wholly outside the law, they would be immune from federal sanctions. Certainly, nothing in the text of the Equal Protection Clause compels that result. On the contrary, read together with the Enforcement Section of the Amendment, it seems plain Congress was given the necessary power to deal with the problem and has appropriately exercised it in Section 241. It remains to test our conclusion against the available evidence of the intent of the framers of the Fourteenth Amendment.

2. *The contemporary history of the Equal Protection Clause and the Fifth Section of the Fourteenth Amendment indicates a purpose to authorize congressional legislation reaching private conspiracies*

The most compelling evidence of the intent of the framers of the Fourteenth Amendment is, of course, to be found in the reports and debates of the Thirty-Ninth Congress which drafted the Amendment and proposed it to the States. But, unfortunately, those

materials contain nothing really conclusive on the point at issue here. See Harris, *The Quest for Equality* (1960), pp. 35-40. The reason is that other questions—ultimately resolved by Sections 2, 3 and 4 of the Amendment—were more controversial at the time and occupied the attention of the Congress. That is not to say that the debates of 1866 foreclose our construction of the Equal Protection Clause and the Enforcement Section. On the contrary, it is clear, as Senator Howard of Michigan emphasized at the time, that the Congress viewed “the first section [of the Amendment], taken in connection with the fifth, as very important” (Cong. Globe, 39th Cong., 1st Sess., p. 2765)—which suggests a broad conception of congressional power to effectuate the guarantees of the Equal Protection Clause against all interference. See Flack, *The Adoption of the Fourteenth Amendment* (1908), pp. 136-139, 277; ten Broek, *The Antislavery Origins of the Fourteenth Amendment* (1951), pp. 213-215; James, *The Framing of the Fourteenth Amendment* (1956), p. 181. Yet, the precise question presented here was never unequivocally resolved and we must turn to other materials for an answer.

Besides the text itself, indications of the original understanding of the scope of congressional power to enforce the Equal Protection Clause are to be found primarily in three sources: (a) the evidence of prevailing conditions submitted to the framers of the Fourteenth Amendment, *i.e.*, conditions which the provision was designed to remedy; (b) congressional legislation enacted at immediately ensuing sessions,

implementing the Fourteenth Amendment or the similarly worded Fifteenth Amendment; and finally, (c) the contemporaneous judicial decisions construing the two Amendments. In each case, the evidence points in the same direction: that Congress was authorized to legislate against private conspiracies in the circumstances envisaged by Section 241.

a. The Fourteenth Amendment must, of course, be "read * * * in connection with the known condition of affairs out of which the occasion for its adoption" arose. *Maxwell v. Dow*, 176 U.S. 581, 601-602. Particularly relevant is the evidence of those conditions directly brought to the attention of the framers of the Amendment, for it may reasonably be supposed that their work was meant to correct the evil as they saw it. Accordingly, we turn to the materials before the Thirty-Ninth Congress which adopted the Fourteenth Amendment and its Joint Committee on Reconstruction (or "Committee of Fifteen") which framed the proposal.

There was, first, the report of General Schurz on conditions in the South.¹⁵ It revealed an oppression of the Negro that was not exclusively, or even primarily, official. On the contrary, the report recited murders, beatings and other outrages perpetrated against Negroes and northerners by private individuals, acting singly or in groups,¹⁶ and stressed the need to protect the freedmen from private ^{or} persecution

¹⁵ Senate Executive Document No. 2, 39th Cong., 1st Sess.

¹⁶ *Ibid.*, pp. 7-9, 17-20; see also attached documents Nos. 12, 18, 20, 21, 22, 24, 26, 32, 43.

as well as from official oppression. See tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (1951), p. 164.

The same focus is reflected in the testimony on conditions in the South taken by the Joint Committee on Reconstruction. To be sure, witnesses related instances of discriminatory State legislation¹⁷ and, more frequently, abuse of power by State officials.¹⁸ But by far the greater part of the testimony concerned private wrongs motivated by popular prejudice and hostility toward Negroes,¹⁹ and, to a lesser degree, against Northern whites²⁰ and Southern whites who had been loyal to the Union.²¹ See Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353, 1354-1356. That evidence was widely distributed. The testimony taken by the Joint Committee, together with its report and recommendations, was printed in 100,000 copies for distribution by Congress;²² excerpts from

¹⁷ Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess., House Reports, Vol. 2, No. 30 (Government Printing Office, 1866), *e.g.*, pt. II at 218, 269; pt. III at 25, 31, 37, 61, 68, 133, 145, 184; pt. IV at 10.

¹⁸ See, *e.g.*, *id.*, pt. II at 6, 7, 17, 31, 51, 143, 145, 175, 178, 180, 184, 208-211, 215, 216; pt. III at 14, 46, 62, 168-169; pt. IV at 53, 75, 78-81, 142.

¹⁹ See, *e.g.*, *id.*, pt. I at 108, 121; pt. II at 17, 53, 55, 127, 170, 175, 183, 196, 197, 206, 218, 222, 223, 269; pt. III at 3, 5, 7, 8, 10, 17, 37, 78, 141, 143, 146-147, 149, 150, 184, 185; pt. IV at 9, 36, 39, 46-50, 64-65, 75, 81, 83, 88, 125, 153.

²⁰ See, *e.g.*, *id.*, pt. II at 2, 47, 179, 208, 218; pt. III at 19, 70, 143, 151; pt. IV at 4, 8, 37, 48, 53, 55, 60, 67, 73, 79, 81.

²¹ See, *e.g.*, *id.*, pt. II at 17, 43, 47, 110, 153, 171, 207, 269; pt. III at 7, 61, 70, 78, 168-169; pt. IV at 60, 66, 73.

²² Cong. Globe, 39th Cong., 1st Sess., pp. 3325, 3326.

the daily testimony were published and commented upon in the northern press;²² and it is probable that the evidence gathered by the Committee was repeatedly invoked when the Republican Party campaigned in 1866 on a platform consisting of the Fourteenth Amendment and the Civil Rights Bill.²³

The inference is compelling that not only the Joint Committee, but Congress as a whole, and also the ratifying legislatures, regarded the Fourteenth Amendment as empowering Congress to deal effectively with the atrocities depicted in the testimony.

b. A further indication of the original understanding is to be found in the legislation enacted by Congress almost contemporaneously with the adoption of the Fourteenth and Fifteenth Amendments, particularly the Enforcement Act of May 31, 1870 (16 Stat. 140) and the Ku Klux Klan Act of April 20, 1871 (17 Stat. 13).

There is, of course, no doubt that those enactments reached private conduct. Section 6 of the Act of 1870 is the predecessor of our Section 241, which, as we have shown (*supra*, pp. 13-15), was plainly intended to deal with unofficial conspiracies interfering with the rights secured by both the Fourteenth and Fifteenth Amendments. Section 5 of the same measure was aimed at "any person" who intimidates another "to whom the right of suffrage is secured or guaranteed by the Fifteenth Amendment" with respect to his right to vote. And the criminal

²² Kendrick, *Journal of the Joint Committee of Fifteen on Reconstruction* (1914), p. 265.

²³ See Frantz, *supra*, at p. 1355.

provisions of the Act of 1871 were construed as reaching private individuals in *United States v. Harris*, 106 U.S. 629. The question is whether that legislation accurately translates the intent of the framers of the Fourteenth and Fifteenth Amendment with respect to the enforcement power of Congress.

The presumption is that it does, because almost contemporaneous with the Amendments—the enactment of the Enforcement Act of 1870 (May 31) coming only two months after the ratification of the Fifteenth Amendment, on March 30, 1870 (16 Stat. 1131). But there is a closer connection: the legislators who wrote the Acts of 1870 and 1871 were in large measure the very framers of the Fourteenth and Fifteenth Amendments. Cf. *Bors v. Preston*, 111 U.S. 252, 256–257. Thus, of the 33 Senators and 120 Representatives who had voted in favor of the Fourteenth Amendment (Cong. Globe, 39th Cong., 1st Sess., pp. 3042, 3148–3149) 15 Senators and 32 Representatives were present when the bill which became the Act of May 31, 1870 (the Enforcement Act) came to a vote in the 41st Congress, and all of them, save only one Representative, voted in favor of the measure. Cong. Globe, 41st Cong., 2d Sess., pp. 3809, 3884; Biographical Directory of the American Congress, 1774–1961, pp. 182–185, 191–195. In addition, three former representatives had become Senators and all three voted for the bill. *Ibid.* And, perhaps even more significant, all seven of the fifteen members of the Joint Committee on Reconstruction which had drafted the Fourteenth Amendment who had con-

curring in the Joint Committee's Report and who still remained in Congress (Howard, Harris, Williams, Stevens, Bingham, Morrill and Washburn) supported the bill. ²³ Black, *The Adoption of the Fourteenth Amendment*, p. 60; Cong. Globe, 41st Cong. 2d Sess., p. 3809; Biographical Directory of the American Congress, 1774-1961, pp. 191-195.²⁴ Similarly, eleven of the twelve Senators and all of the eleven Representatives who had voted for the Fourteenth Amendment and who were present when the bill which became the Ku Klux Klan Act came to a vote cast their votes in favor of the bill. Cong. Globe, 42d Cong., 1st Sess., pp. 808, 831.²⁵

Most compelling of all, however, is the participation in the enactment of the Act of 1870—which primarily enforced the Fifteenth Amendment—of legislators who had voted in favor of the Fifteenth Amendment. Of 39 Senators who had favored the Amendment (Cong. Globe, 40th Cong., 3d Sess., p. 1641), 28—more than two-thirds—remained and *all* voted in favor of the statute (Cong. Globe, 41st Cong., 2d Sess., p. 3809); and all 63 (out of 144) members of the House still present likewise supported the Enforcement Act (Cong. Globe, 40th Cong., 3d Sess., pp. 1563-1564; *id.*, 41st Cong., 2d Sess., p. 3884). It is thus apparent that the framers of the Fifteenth

²³ The only remaining member of the Joint Committee who voted against the Enforcement Act was Representative Rogers, a Democrat, who had opposed the Report of the Joint Committee and had voted against the Fourteenth Amendment. *Ibid.*

²⁴ One former Representative voted as a Senator and one former Senator voted as a Representative.

Amendment thought it authorized legislation reaching private conspiracies. See Mathews, *Legislative and Judicial History of the Fifteenth Amendment* (1909), pp. 78-96. If that be so, there is no basis for giving a different construction to the similarly worded Fourteenth Amendment.

This concurrence of votes (with only two exceptions) is more than a coincidence. It would be extraordinary to suppose that many or most of the legislators who remained had changed their minds. Indeed, Representative Bingham, the chief artisan of the Equal Protection Clause and the Enforcement Section of the Fourteenth Amendment expressly defended the Ku Klux Klan bill of 1871 as implementing his own understanding of 1866. Cong., Globe, 42d Cong., 1st Sess., App., p. 55. Nor can we lightly assume that members of Congress would knowingly overstep the boundaries of constitutional power which they themselves had participated in fixing. The natural inference is that the legislation of 1870 and 1871 carries out the Fourteenth and Fifteenth Amendments in a wholly legitimate exercise of power which had been given earlier and was now invoked because lesser remedies had not succeeded in curing the evil.

c. The earliest judicial decisions sustained congressional power to protect the rights which the Fourteenth and Fifteenth Amendments secure against private encroachment. Their proximity to the Amendments suggests that they accurately translate the original understanding.

One of the first cases was *United States v. Hall*, 26 Fed. Cas. 79 (S.D. Ala. 1871), decided by Judge Woods, afterwards a Justice of this Court and its spokesman in *United States v. Harris*, 106 U.S. 629. The charge was laid under Section 6 of the Enforcement Act of 1870 (now 18 U.S.C. 241) and it was alleged that the defendants—not claimed to be State officers—had conspired to injure, “oppress, threaten and intimidate” certain citizens of the United States to prevent their free exercise and enjoyment of the rights of freedom of speech and peaceable assembly. The defendants demurred to the indictment and questioned the power of Congress to enact Section 6. 26 Fed. Cas. at 80. Quoting the Equal Protection Clause and noting that Congress is given an express power to enforce it, the court declared (26 Fed. Cas. at 81):

From these provisions it follows clearly, as it seems to us, that congress has the power, by appropriate legislation, to protect the fundamental rights of citizens of the United States against unfriendly or insufficient state legislation, for the fourteenth amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen, but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. The citizen of the United States is entitled to the enforcement of the laws for the protection of his fundamental rights, as well as

the enactment of such laws. Therefore, to guard against the invasion of the citizen's fundamental rights, and to insure their adequate protection, as well against state legislation as state inaction, or incompetency, the amendment gives congress the power to enforce its provisions by appropriate legislation. And as it would be unseemly for Congress to interfere directly with state enactments, and as it cannot compel the activity of state officials, the only appropriate legislation it can make is that which will operate directly on offenders and offenses, and protect the rights which the amendment secures.

Judge Woods upheld the charge even though the underlying statute was not limited to take effect only where particular State legislation was "unfriendly" or "insufficient" or where a particular State was "incompetent", and even though the indictment contained no such allegation with respect to the State of Alabama or the community where the offense had occurred. He reasoned that "[t]he extent to which Congress shall exercise this power must depend on its discretion in view of the circumstances of each case." *Ibid.* (emphasis added). Section 6 was "appropriate to the end in view, namely, the protection of the fundamental rights of citizens of the United States." 26 Fed. Cas. at 82. See, also, *United States v. Mall*, 26 Fed. Cas. 1147 (S.D. Ala.).

In 1873, two years after the decision in *Hall*, Mr. Justice Strong—later the author of this Court's opinions in three Fourteenth Amendment cases de-

cided in 1880²⁷—handed down an opinion on circuit in *United States v. Given*, 25 Fed. Cas. 1324 (D. Del.), dealing with congressional enforcement power under the Fifteenth Amendment. A State official had been convicted under Section 2 of the Enforcement Act of 1870, which punished the refusal, on racial grounds, to permit any citizen to perform any act necessary to become a qualified voter. 16 Stat. 140. The defendant filed a motion in arrest of judgment, arguing that the statute was unconstitutional. In rejecting this claim, Mr. Justice Strong did not rely upon the presence of "State action." Rather, he reasoned that the "primary object" of the Fifteenth Amendment (as well as the Thirteenth and Fourteenth Amendments), was "to secure to persons certain rights which they had not previously possessed,"²⁸ and to protect those rights "against any infringement from any quarter." 25 Fed. Cas. 1325, 1326 (emphasis added). Mr. Justice Strong elaborated (25 Fed. Cas. at 1327):

²⁷ *Strauder v. West Virginia*, 100 U.S. 303; *Virginia v. Rives*, 100 U.S. 313; *Ex parte Virginia*, 100 U.S. 339.

²⁸ "The Thirteenth, Fourteenth, and Fifteenth Amendments of the Constitution have confessedly extended civil and political rights, and, I think, they have enlarged the powers of Congress. The primary object of the Thirteenth, and of the First sections of the Fourteenth and Fifteenth Amendments was to secure to persons certain rights which they had not previously possessed * * *. It is true that the (15th) amendment is in form a prohibition upon the United States, and upon the states, but it is not the less on that account an assertion of a constitutional right belonging to citizens as such. Surely it cannot be maintained that it conferred no rights upon persons."

It was well known when [the Fifteenth Amendment] was adopted that in many quarters it was regarded with great disfavor. It might well have been anticipated that it would meet with evasion and hindrances, not from state legislatures, for their affirmative action was rendered powerless by it, or not from a state's judiciary, for their judgments denying the right were reviewable by federal courts, but by *private persons* and ministerial officers, officers, by assessors, collectors, boards of registration, or election officers. And it might have been foreseen that by these agencies a right intended to be substantial could become *incapable of full enjoyment* * * *. Earlier prohibitions to the states were left without any express power of interference by congress; but these later, *encountering so much popular prejudice* and working changes so radical, were fortified by grants to congress of power to carry them into full effect—that is, to enact any laws appropriate to give *reality* to the rights declared [emphasis added].

See, also, the opinion of Judge Bradford, delivered in the same case. 25 Fed. Cas. 1328-1329.

Another significant opinion is that delivered on circuit by Mr. Justice Bradley (who was to write the Court's opinion in the *Civil Rights Cases*, 109 U.S. 3) in *United States v. Cruikshank*, 1 Woods 308, 25 Fed. Cas. 707. The Circuit Justice expressed his view that the Fourteenth Amendment did not empower Congress "to pass laws for the general preservation of social order in every state," and that the Due Process Clause, in particular, was "not intended

as a guaranty against the commission of murder, false imprisonment, robbery or any other crime committed by individual malefactors, so as to give congress the power to pass laws for the punishment of such crimes in the several states generally." 1 Woods at 316. And he accordingly held the charge against private conspirators insufficient insofar as it alleged invasion of due process rights. But, although he found the indictment defective for failure to allege a racial motive, the Justice took a different view of the power of Congress to reach private encroachment upon rights secured by the Fifteenth Amendment—which, it seems to us, is equally applicable to enforcement of the Equal Protection Clause. Speaking of the Fifteenth Amendment, he said (1 Woods 324):

Considering, as before intimated, that the amendment, notwithstanding its negative form, substantially guaranties the equal right to vote to citizens of every race and color, I am inclined to the opinion that congress has the power to secure that right not only as against the unfriendly operation of state laws, but against outrage, violence, and combinations on the part of individuals, irrespective of the state laws. Such was the opinion of congress itself in passing the law at a time when many of its members were the same who had consulted upon the original form of the amendment in proposing it to the states. And as such a construction of the amendment is admissible, and the question is one at least of grave doubt, it would be assuming a great deal for this court to decide the law, to the extent indicated, unconstitutional.

It is needless to say that the opinions just recited are not offered as binding precedents; indeed, in one case (*Hall*) the ruling goes somewhat farther than our argument. We submit the cases, rather, as persuasive evidence of the original understanding of the Amendments to which they are most proximate in time. Perhaps the philosophy of those early opinions, in some measure, has been repudiated or qualified by later decisions of this Court. Yet, it is important to emphasize that no subsequent case here need be read as disapproving the doctrine of the quoted opinions insofar as it applies to the circumstances in suit—the principle that Congress may enforce the guarantee of equal protection with respect to State-owned or State-operated public facilities by punishing private conspiracies intimidating Negroes out of their right to enjoy those benefits equally with white persons.

3. *No decision of this Court forecloses a construction of the Equal Protection Clause and the Fifth Section of the Fourteenth Amendment that would authorize congressional legislation reaching private conspiracies in the circumstances of the present case*

To be sure (as we have already noticed, *supra*, p. 19), there are statements in opinions of the Court which seem opposed to the interpretation of the Enforcement Section of the Fourteenth Amendment for which we contend. We do not discount the weight of those expressions by distinguished Justices. But they may properly be characterized as *dicta*: the fact is that acceptance of our limited submission with

respect to the power of Congress to enforce the guaranties of the Equal Protection Clause as against private interference does not require overruling any decision in this Court.

Certainly, nothing in the *Slaughter-House Cases*, 16 Wall. 36, undermines our argument. On the contrary, so far as that decision treats of the Equal Protection Clause and the power of Congress to enforce its guarantee, it suggests that legislation may appropriately reach private acts against the rights of Negroes; for it is said (apparently with reference to the Equal Protection Clause) that the Fourteenth Amendment was intended to secure "the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him" (*id.* at 71). Nor is the decision in *United States v. Reese*, 92 U.S. 214, hostile to our submission. The Court there invalidated Sections 3 and 4 of the Enforcement Act of 1870, which purported to implement the Fifteenth Amendment, on the ground that they were not properly confined to interference with the right to vote for reasons of color or race. That is, of course, wholly irrelevant to our case. But it is perhaps instructive that, although the decision goes beyond the facts of the case to condemn the provisions of the Act of 1870 for reaching too far, the Court did not criticize Section 4 because it punished private acts of intimidation. Indeed, as late as *Ex parte Yarbrough*, 110 U.S. 651, the Court apparently assumed that the "right to be protected against discrimination" in voting guaranteed

by the Fifteenth Amendment might be "kept free and pure by congressional enactments" punishing private interference. *Id.* at 664-665. The contrary was never asserted by this Court until *James v. Bowman*, 190 U.S. 127, 136-139, and then only as an alternative ground for dismissing an indictment that was, in any event, defective under *Reese* for failure to allege a racially discriminating purpose. *Id.* at 139-142.

This Court's decision in *United States v. Cruikshank*, 92 U.S. 542, is more in point and some of the language of the opinion might be read adversely to our contention. The Court does seem to hold that Congress cannot implement the Due Process Clause by making an ordinary private "conspiracy to falsely imprison and murder citizens" a federal crime. *Id.* at 553-554. That is probably also the rationale of this Court's *per curiam* decision in *United States v. Powell*, 212 U.S. 564, affirming the dismissal of a charge of lynching a Negro. But when it comes to the counts of the indictment charging a denial of equal protection and a denial of the right to vote, they are dismissed not because federal legislation enforcing the Equal Protection Clause and the Fifteenth Amendment can never reach private acts, but only because the charge failed to allege an intent to effect a discrimination on account of race or color. *Id.* at 554-556. Similarly, the landmark cases of 1880, *Strauder v. West Virginia*, 100 U.S. 303; *Virginia v. Rives*, 100 U.S. 313, and *Ex parte Virginia*, 100 U.S. 339, do not resolve the question here. To be sure, they articulated the "State action" concept, but that was a reply

to the contention that congressional legislation could not reach State officials. See the dissenting opinion of Mr. Justice Field, *id.* at 349, 353. The ruling of the Court was not a restrictive one; it found State officers of every category amenable to the Fourteenth Amendment, without purporting to decide whether Congress might also reach private persons in certain circumstances.

Concededly, some of the language of the Court's opinion in the *Civil Rights Cases*, 109 U.S. 103, seems opposed to our conclusion. But that decision, dealing with privately-owned places of public accommodation, like *Hodges v. United States*, 203 U.S. 1, involving an employment contract, may be explained on the ground that the underlying relationships, then viewed as purely private, were wholly outside the area governed by the Equal Protection Clause. It has been pointed out that the opinion itself does not foreclose congressional legislation reaching private conspiracies in all circumstances. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 72 Yale L.J. 1353, 1377-1381. In any event, the result is not inconsistent with our submission.

There remains the case of *United States v. Harris*, 106 U.S. 629, which held unconstitutional a section of the Ku Klux Klan Act of 1871 punishing private conspiracies formed "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges under the laws, or for the purpose of hindering the constituted authorities of any State or Ter-

ritory from giving or securing to all persons within the State or Territory the equal protection of the laws." On its face, that statute is very similar to Section 241 insofar as it protects the right guaranteed by the Equal Protection Clause. But the Court construed the provision much more broadly than we do Section 241. Indeed, the indictment—which was said to be "a good indictment under the law if the law itself were valid" (*id.* at 639)—charged the lynching of a prisoner and a denial of protection from violence at the hands of a mob, without alleging any racial or discriminatory purpose. It is doubtful if the right recited is one arising under the Equal Protection Clause at all; today, at least, it would seem more a claim under the Due Process Clause—which we do not argue may be protected against private conspiracies. But, in any event, the factual situation bears no resemblance to the instant case; *Harris* is, in effect, the same case as *Cruikshank* and *Powell*, and the doctrine of *Reese* required invalidating a statute that reached so far, even if it might properly operate in a narrower radius. In sum, although some of the broad language of the opinion is hostile to our submission (see *id.* at 637-640), *Harris* may stand consistently with a ruling upholding the present indictment insofar as it charges a conspiracy to intimidate Negroes ^{or} of asserting their right to the equal utilization of public facilities owned or operated by the State.

So far as we are aware, there are no more recent cases in this Court that bear on the question. To be sure, it has been reiterated that "the action inhibited

by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States." *E.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 13. But such statements may fairly be read as defining only the self-executing force of the Amendment, unaided by implementing legislation. There has been no occasion in recent years to consider the scope of the congressional power to enforce the guarantee of the Equal Protection Clause against private conspiracies. After *Harris*, the criminal sanctions of the Ku Klux Klan Act of 1871 were no longer available and the ruling in *United States v. Williams*, 341 U.S. 70, seemed to foreclose prosecutions of this character under Section 241 of the Criminal Code. The civil remedy provided by the Act of 1871—now 42 U.S.C. 1985(3)—was before the Court in *Collins v. Hardyman*, 341 U.S. 651, but the constitutional question was avoided and the circumstances alleged there were, in any event, more like *Harris* than the present case. The only comparable modern statute is 42 U.S.C. 1971(c)—part of the Civil Rights Act of 1957—authorizing the Attorney General to seek injunctive relief against invasion of the right guaranteed by the Fifteenth Amendment by "any person"—which presumably includes private individuals. But when the question of its constitutionality came here in *United States v. Raines*, 362 U.S. 17, the Court found it unnecessary to decide whether the provision could validly operate with respect to private acts.

We conclude that no authoritative precedent stands in the way of a construction of Section 241 which

implements the fundamental purpose of the Equal Protection Clause.

II

SECTION 241 REACHES CONSPIRACIES AGAINST THE EXERCISE OF THE RIGHTS TO TRAVEL FREELY TO AND FROM ANY STATE AND TO USE THE INSTRUMENTALITIES OF INTERSTATE COMMERCE

Even under the most restrictive view of Section 241, "rights which arise from the relationship of the individual to the Federal Government" are within its purview. *United States v. Williams*, 341 U.S. 70, 77 (Frankfurter, J.); *Ex parte Yarbrough*, 110 U.S. 651. In that category, we submit, are rights mentioned in paragraph four of the present indictment, which alleges a conspiracy to injure, oppress, threaten and intimidate Negro citizens in the free exercise and enjoyment of their rights "to travel freely to and from the State of Georgia" and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia" (*supra*, p. 6).

Following this Court's ruling in *In re Quarles*, 158 U.S. 532, 535, that "[e]very right created by or arising under or dependent upon the Constitution may be protected and enforced" as Congress deems proper, the circuit court in *United States v. Moore*, 129 Fed. 630 (N.D. Ala.), enumerated those rights which it believed were afforded protection in Section 241 (then Rev. Stat. 5508). Included were "the right to engage in interstate commerce," and "the right to pass from one state to any other for any lawful purpose." 129 Fed.

at 633.²⁹ That conclusion was firmly based in prior decisions of this Court, and the more recent cases continue to sustain its validity.

A. In *Crandall v. Nevada*, 6 Wall. 35, this Court invalidated a State tax on "every person leaving the State by" common carrier. Expressly refusing to place sole reliance on any specific provisions of the Constitution, the Court held (6 Wall. at 49) that the governing principle, inferred from the Constitution as a whole, was that stated by Chief Justice Taney in *The Passenger Cases*, 7 How. 283, 492: "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

The view expressed in *Crandall* has persisted to this day. See, e.g., *Williams v. Fears*, 179 U.S. 270, 274; *Twining v. New Jersey*, 211 U.S. 78, 97; *Edwards v. California*, 314 U.S. 160, 177 (Douglas, J.), 182-186 (Jackson, J.); *New York v. O'Neill*, 359 U.S. 1, 6-7 (opinion of the Court), 12-14 (Douglas, J.). See, also, *Bell v. Maryland*, 378 U.S. 226, 240-252 (Douglas J.), 293-294 and n. 10 (Goldberg, J.). In *Twining*, the Court catalogued a number of the rights which had been recognized as arising "out of the nature and essential character of the National Government," including "the right to pass freely from State to State, [recognized in] *Crandall v. Nevada* * * *" (211 U.S. at 97). It is particularly signifi-

²⁹ The list also included "the right to go to and return from the seat of government" (*ibid.*).

cant that all of the rights which the Court placed in the same category with the right to free ingress and egress were rights recognized in prosecutions of private conspiracies under the predecessors of Section 241.³⁰ Although the majority in *Edwards v. California*, *supra*, preferred to rest its decision on the Commerce Clause, four Justices expressed the view that the decision—invalidating a statute prohibiting bringing indigents into the State—should be grounded in “the right of persons to move freely from State to State.” 314 U.S. at 177 (Douglas, J.). Mr. Justice Jackson, pointing out that aliens admitted to this country have the privilege of entering and abiding in any State in the Union, *Truax v. Raich*, 239 U.S. 33, 39, reasoned “that federal citizenship implies rights to enter and abide in any state of the Union at least equal to those possessed by aliens * * *” (314 U.S. at 184).

³⁰ The catalogue of federal citizenship rights presented by this Court in *Twining* is as follows (211 U.S. at 97-98):

Thus among the rights and privileges of National citizenship recognized by this court are the right to pass freely from State to State, *Crandall v. Nevada*, 6 Wall. 35; the right to petition Congress for a redress of grievances, *United States v. Cruikshank*, *supra*; the right to vote for National officers, *Ex parte Yarbrough*, 110 U.S. 651; *Wiley v. Sinkler*, 179 U.S. 58; the right to enter the public lands, *United States v. Waddell*, 112 U.S. 76; the right to be protected against violence while in the lawful custody of a United States marshal, *Logan v. United States*, 144 U.S. 263; and the right to inform the United States authorities of violation of its laws, *In re Quarles*, 158 U.S. 532. Most of these cases were indictments against individuals for conspiracies to deprive persons of rights secured by the Constitution of the United States * * *.

United States v. Wheeler, 254 U.S. 281, relied on by the court below (R. 33), is not controlling here. In *Wheeler*, the United States brought a prosecution under the predecessor of 18 U.S.C. 241 against the participants in a conspiracy to seize United States citizens residing in Arizona and remove them from the State. The right to travel freely from State to State was not involved. Rather the indictment charged the defendants with interfering with "the right and privilege pertaining to citizens of said State to reside and remain therein and to be immune from unlawful deportation from that State to another" (254 U.S. at 292, emphasis added). Although the opinion contains broader *dictum*, the Court merely held that a conspiracy to deprive citizens of their right to reside in a particular State was not an offense under Section 241, because only a right of State citizenship was involved. See *Edwards v. California*, 314 U.S. 160, 180 (Douglas, J.), describing *Wheeler* as involving "the incidents of residence"; *United States v. Williams*, 341 U.S. 70, 80 (Frankfurter, J.), stating that *Wheeler* involved a conspiracy to compel citizens "to move out of a State." The language in *Wheeler* relied upon by the court below was not necessary to the decision and, we submit, should not be followed.

The right to travel freely among the States is not expressly mentioned in the Constitution. Article IV of the Articles of Confederation, however, provided that "the people of each State shall have free ingress and regress to and from any other State." Noting that some of the other language in the Article was

carried over into Article IV, Section 2 of the Constitution, Chief Justice White in *Wheeler* inferred that the right to free ingress and egress was likewise carried over and entrusted to the protection of the States under that constitutional provision. But the more logical inference, it seems to us, is that the omitted clause was not intended to be within the ambit of the Constitution's Article IV. The provision for the right of free travel from State to State during the Confederation was in the nature of comity between entities which, according to Article II of the Articles of Confederation, retained their "sovereignty, freedom, and independence."⁵¹ The formation of the federal Union involved, of necessity, greater cohesion among the States. As Professor Chafee has pointed out, the reason no specific provision was made in the Constitution for the right to travel freely throughout the country must have been that it was assumed, in light of the essential nature of the Union, that such a right was already included. Chafee, *Three Human Rights in the Con-*

⁵¹ Even though the Articles of Confederation were submitted to the States in 1777 and all but Maryland ratified them by 1779, the several States continued during the Revolution to issue their own passports. This embarrassed travel and complicated long distance shipment of provisions for the Continental Army. 12 J. Cont. Cong. 861, 862 (Sept. 2, 1778, Lib. of Cong. 1908). Congress also issued passports, and when one of them was dishonored by citizens of Pennsylvania, a sharp argument arose whether Congressional passports had to be recognized (25 J. Cont. Cong. 859, 897, Jan. 24 & Feb. 13, 1783, Lib. of Congress 1922).

stitution 185 (1956).” The right is multistate by its very nature. It is not linked to any State sovereignty but has its source in the union of all the States. It follows, we suggest, that a conspiracy to interfere with the right to pass freely from State to State is an offense, not only to the individuals directly involved, but to the federal Union itself.

B. Closely related to the right to travel freely from State to State is the right to use the highways and other instrumentalities of interstate commerce. It, too, we submit, is protected by Section 241—even accepting the most restrictive interpretation—because it is a right “arising from the substantive powers of the Federal Government”—under the Commerce Clause—“which Congress can beyond doubt secure against interference by private individuals.” *United States v. Williams*, 341 U.S. 70, 73, 77 (Frankfurter, J.).

It is well settled that the federal commerce power embraces the movement of persons, as well as commodities, on the instrumentalities of interstate com-

³² Also in *dictum*, the Court in *Wheeler* sought to distinguish *Orandall v. Nevada* on the ground that the decision was based upon the view that Nevada’s tax “was held directly to burden the performance by the United States of its governmental functions and also to limit the rights of the citizens growing out of such functions * * *.” (254 U.S. at 299). But, as Mr. Justice Douglas pointed out in *Edwards v. California*, 314 U.S. 160, 178: “[T]here is not a shred of evidence in the record of the *Orandall* case that the persons there involved were en route on any such mission * * *. The point which Mr. Justice Miller made was merely an illustration of the damage and havoc which would ensue if the States had the power to prevent the free movement of citizens from one State to another.”

merce. *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203; *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U.S. 204, 218-219; *Hoke v. United States*, 227 U.S. 308, 310; *United States v. Hill*, 248 U.S. 420, 423; *Edwards v. California*, 314 U.S. 160, 172. And Congress may, of course, exercise that power to protect individuals from private interference with free interstate movement (*Mitchell v. United States*, 313 U.S. 80; *Henderson v. United States*, 339 U.S. 814; cf. *Brooks v. United States*, 199 F. 2d 336 (C.A. 5) (interstate lynching)), or from violations of civil rights which, while local in nature, affect interstate commerce (*Boydton v. Virginia*, 364 U.S. 454; *Katzenbach v. McClung*, 379 U.S. 294). But, even in the absence of legislation, the Commerce Clause has a force of its own. In some circumstances, it authorizes executive action to eliminate private obstructions to the instrumentalities of commerce. *In re Debs*, 158 U.S. 564, 586. Moreover, the clause has been held to invalidate, by its own force, private acts or practices which interfere with interstate movement. *Chance v. Lambeth*, 186 F. 2d 879 (C.A. 4), certiorari denied, 344 U.S. 877; *Whiteside v. Southern Bus Lines, Inc.*, 177 F. 2d 949 (segregation by interstate carrier); *United States v. U.S. Klans*, 194 F. Supp. 897 (M.D. Ala.) (private interference with interstate travel of "Freedom Riders"). Whatever the full scope of the Commerce Clause, it must at least grant the bare right to use the highways and other instrumen-

talities of interstate commerce. We submit, as stated in *United States v. Moore*, 129 Fed. 630, 631-632 (C.C. N.D. Ala.), that the right alleged here is one "created by or arising under or dependent upon the Constitution" and is therefore protected by Section 241.

So saying, we do not suggest an undue enlargement of federal criminal jurisdiction. Our contention here—no more than our argument under Point I—does not involve wholesale supersession or duplication of the municipal laws of the States. That Section 241 encompasses the rights freely to pass from State to State and to use the instrumentalities of interstate commerce does not mean that every crime—violent or otherwise—committed on a highway or incidentally affecting the use of a highway or other instrumentality of commerce is punishable under federal law. A specific intent to interfere with the use of such instrumentalities must be shown. A conspiracy to assault an interstate traveler, for example, would not, without more, violate Section 241. But conspiracies aimed at establishing a zone of restricted travel on the basis of race or preventing "outsiders" from entering a certain community—both of which are covered by the present indictment³³—are plainly within the reach of the statute.

³³ These situations are merely illustrative and are not intended to indicate what the government will attempt to prove if the case goes to trial.

III

SECTION 241 REACHES CONSPIRACIES AGAINST THE EXERCISE OF RIGHTS SECURED BY TITLE II OF THE CIVIL RIGHTS ACT OF 1964

Tracking the language of Section 201(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000a(a), the first paragraph of the indictment charges a conspiracy to oppress Negro citizens in the exercise of their right, granted by that statute, "to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations" of restaurants, motion picture theaters and other privately owned places of public accommodation. Whether or not it has an independent source in the Equal Protection Clause of the Fourteenth Amendment (see *Bell v. Maryland*, 378 U.S. 226, 245-255 (Douglas, J.), 286-317 (Goldberg, J.), 326-346 (Black, J.)) or is an incident of national citizenship (*id.* at 250 (Douglas, J.), 294 (Goldberg, J.)), the right to equal enjoyment of places of public accommodation is expressly conferred by positive legislation implementing the Commerce Clause (see *Atlanta Motel v. United States*, 379 U.S. 241). As a right "that flow[s] from the substantive powers of the Federal Government," it "may clearly be protected from private interference." *United States v. Williams*, 341 U.S. 70, 78 (Frankfurter, J.); *United States v. Waddell*, 112 U.S. 76. Thus, even under the most restrictive view of the scope of Section 241,³⁴ the allegation of a private conspiracy

³⁴The labor cases cited by the court below (R. 31) have no bearing on this point. *United States v. Moore*, 129 Fed. 639 (C.C.N.D. Ala.), decided long before the passage of the

aimed, in part, against the free exercise of rights granted by the public accommodations title of the Civil Rights Act of 1964³⁵ states an offense within the former provision.

There are only two possible obstacles. The first is peculiar to this case and relates to the sufficiency of

National Labor Relations Act, did not involve any statutory right; it held simply that the right to organize labor unions was not one of the privileges and immunities of national citizenship. *United States v. Bailes*, 120 F. Supp. 604 (S.D. W. Va.), held that the right not to form labor unions was not dependent on the laws or Constitution of the United States since it existed before the Constitution was framed and that, in any event, the Labor Management Relations Act did not give employees any rights against persons acting in their individual capacities. *United States v. Berke Cake Co.*, 50 F. Supp. 311 (E.D.N.Y.), seems to hold that only rights secured by the Fourteenth or Fifteenth Amendments are protected by Section 241. But this position is plainly contrary to *United States v. Waddell*, 112 U.S. 76 (upholding prosecution for conspiracy to interfere with rights granted under the Homestead Acts).

³⁵ The failure of the indictment specifically to allege that the places of public accommodation referred to are covered by the Act is of no significance. It is clear, as the district court itself noted, that the draftsman of that part of the indictment relied on and intended to invoke Title II (see R. 32). Moreover, it is difficult to conceive of a restaurant that is not a covered establishment. See *Katzenbach v. McClung*, 379 U.S. 294, 298, 301-305; *Hamm v. Rock Hill*, 379 U.S. 306, 309-310. And, plainly, all motion picture theaters in Athens, Georgia, are covered. See § 201(c)(3) of the Act, 42 U.S.C. 2000a(c)(3). Of course, at trial, the government must show that the conspirators sought to prevent Negroes from asserting their right to enter, or to be served at, establishments covered by the Act. The indictment, we submit, fairly apprises them of the charge. In any event, no such pleading objection was raised or noticed below and the question is not open on this direct appeal.

the present indictment; it is relevant here only insofar as it affects the jurisdiction of this Court on direct appeal. The other objection is more basic: the proposition is that the Civil Rights Act of 1964, in creating a right to nondiscriminatory treatment in places of public accommodation, provided for enforcement only by equitable proceedings—no matter what the circumstances—and thus precluded a criminal prosecution.

A. Appellees may argue that this Court lacks the power to consider the issues discussed in this section of our brief because of the district court's comment that: "It is not clear how the rights mentioned in paragraph one can be said to come from the [1964] Act because § 201(a), *upon which the draftsman doubtless relied*, lists the essential element 'without discrimination or segregation on the ground of race, color, religion, or national origin.' " (Emphasis added.) Noting that the phrase quoted from the Act was not used in the indictment, the court stated that the omission was a defect "not in form, but in substance."³⁶ Although the import of this comment is not clear, it certainly need not be read to restrict this Court's authority to resolve any of the important questions raised by this appeal.

The indictment obtained by the United States in this case charges in a single count that appellees entered into a conspiracy to oppress Negroes in the enjoyment of four specified rights.³⁷ The district

³⁶ Quoting from *United States v. Cruikshank*, 92 U.S. 542, 556.

³⁷ The United States conceded that paragraph 5 of the indictment charging interference with "other rights * * *" adds nothing to the indictment.

court dismissed the indictment on the ground that Section 241 does not reach conspiracies aimed at interfering with *any one* of these rights. In so holding, the district court stated (R. 31-32):

"This court is convinced that the five numerical paragraphs of rights and privileges set forth in this indictment are not federal citizenship rights and privileges; not "federal rights and privileges which appertain to citizens as such", 179 F. 2d at 648, *and do not come within the scope of § 241.* * * * Insofar as said five paragraphs of rights and privileges embrace the right to be free from discrimination by reason of race or color, such rights are Fourteenth Amendment rights, which, as we have seen, *are not encompassed by § 241.* [Emphasis supplied.]

Alternatively, the court held that "any broader construction of § 241 * * * would render it void for indefiniteness" (R. 36). The decision of the district court, therefore, is "a decision * * * dismissing [an] indictment * * * based upon the invalidity or construction of the statute upon which the indictment * * * is founded,"¹⁰ clearly giving this Court jurisdiction on direct appeal under 18 U.S.C. 3731.

The dictum in *United States v. Borden Co.*, 308 U.S. 188, 193, that "[t]his Court must accept the construction given to the indictment by the District Court

¹⁰Arguably, the decision is also a "judgment sustaining a motion in bar, when the defendant has not been put in jeopardy," likewise directly appealable to this Court. See *United States v. Mersky*, 361 U.S. 431, 441-443 (Brennan, J. concurring), 444 (Whittaker, J., concurring). But see *id.* at 452 (Frankfurter, J., dissenting), 455-458 (Stewart, J., dissenting).

* * *," has no application here. In the first place, it is not entirely clear that the court below construed the indictment as failing to invoke rights granted in the public accommodations act; although noting what he viewed as an omission in the pleadings, the trial judge made it plain that he understood what "the draftsman doubtless" meant to change.³⁹ Moreover, the statement in *Borden* should be read in light of Mr. Justice Jackson's later comment in *United States v. Swift & Co.*, 318 U.S. 442, 447 (concurring opinion) that "there is difference of opinion as to whether, if we have jurisdiction, we may proceed beyond the construction of the Act and review opinions about the indictment which the lower court expressed but did not rely upon as an independent ground of decision." The more lenient rule seems appropriate in the present circumstances. The district court's dismissal of the indictment was based on its statutory and (alternatively) constitutional interpretations. It expressed no opinion as to the meaning of the indictment which, viewed independently, would have required its dismissal. The court held unequivocally that there was no mere formal defect that could be cured by amending the indictment. Even if "race" were expressly referred to in the first numbered paragraph, the court would still have dismissed the indictment in all respects. And, finally, the court's objection to the omission of a reference to "race" in paragraph one, it seems to us, is without merit in light of the general

³⁹ Compare *United States v. Wayne Pump Co.*, 317 U.S. 200; *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 536, 564; *United States v. Carbone*, 327 U.S. 633.

allegation in the opening portion of the indictment—which qualifies all that follows—that the conspiracy was directed at Negroes, to deter Negroes (the same as others, presumably) from exercising their rights (*supra*, p. 5). It would be captious to suggest that the defendants were not sufficiently informed that they were charged with a conspiracy against Negroes as Negroes.

The decision below undoubtedly restricts very severely the practical implementation of the rights which Congress sought to bestow in the Civil Rights Act of 1964.⁴⁰ The court has held that these rights, “even though recognized by an Act of Congress” (R. 31),⁴¹ are not within the purview of Section 241, even under its most restrictive reading. So long as the validity of the statutory construction given by the district court and challenged by the government here remains in doubt, neither the Executive nor the Congress can properly determine the need for new remedies or the appropriate solution to the problems raised by incidents such as those underlying the present indictment. The prompt authoritative resolution of

⁴⁰ It is immaterial to this Court’s jurisdiction under Section 3731 that, as to paragraph one, the statute construed was the Civil Rights Act of 1964 rather than Section 241. See *United States v. Borden Co.* 308 U.S. 188, 194; *United States v. Kapp*, 302 U.S. 214.

⁴¹ This language directly referred to the rights involved in *United States v. Bailes*, 120 F. Supp. 614 (S.D. W. Va.), but since the only statute granting substantive rights involved here is the Civil Rights Act of 1964, it may be assumed that the court’s reasoning was that the rights sought to be protected here, although embodied in federal legislation, still were not “federal citizenship rights” under Section 241.

disputes over important questions of statutory interpretation, such as are involved here, is a primary goal of 18 U.S.C. 3731. This Court has the authority to resolve the questions concerning the interpretation of the Civil Rights Act of 1964—as well as those concerning Section 241—and we respectfully urge that it do so in this case.

B. We have already noted that the court below dismissed the indictment insofar as it charges a violent conspiracy to interfere with rights granted by Title II of the Civil Rights Act of 1964 on the ground that the exclusive-remedy provision of that law precludes a criminal prosecution. The holding, in effect, is that Congress, while granting the right to equal treatment in places of public accommodation, at the same time immunized from otherwise applicable criminal sanctions persons who conspire to terrorize Negroes to prevent them from even attempting to assert the newly won right. This anomalous result is said to follow from the stipulation in Section 207(b) of the 1964 Act, 42 U.S.C. 2000a-6(b), that “[t]he remedies provided in this subchapter shall be the exclusive means of enforcing the rights based upon this subchapter.” But the language of that provision does not compel the expansive interpretation given it by the district court. To the contrary, we submit, the purpose of the statute requires a narrower reading.

It is axiomatic that “the policy as well as the letter of the law is a guide to [its interpretation]. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes

* * *.” *Markham v. Cabell*, 326 U.S. 404, 409. See also *United States v. Bryan*, 339 U.S. 323; *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 293. That this principle applies in the construction of Section 207(b) clearly follows from recent decisions here and in the courts of appeals. In *Hamm v. Rock Hill*, 379 U.S. 306, this Court ruled that the provisions of the Act required the abatement of State prosecutions for seeking unsegregated service in places of public accommodation. Even though the injunctive remedy expressly provided in the Act may be used to prevent such prosecutions,⁴² *Dilworth v. Riner*, 343 F. 2d 226 (C.A. 5), the Court held that this means of enforcing Title II rights was not so “exclusive” as an absolutely literal reading of Section 207(b) might imply. 379 U.S. at 311. None of the dissents in that case were directed at this point. Similarly, in *Rachel v. Georgia*, 342 F. 2d 336 (C.A. 5), the court of appeals held that the remedial provisions of the civil rights removal statute, 28 U.S.C. 1443, applied to cases invoking rights granted in the public accommodations law.⁴³ All members of the panel concurred on this question (342 F. 2d at 344, 345). See, also, *New York v. Galamison*, 342 F. 2d 255, 268 (C.A. 2), certiorari denied, 380 U.S. 977. Thus, it is clear that the

⁴² Section 203(c) provides that “No person shall * * * punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by Section 201 or 202” (42 U.S.C. 2000a-2(c)). Section 204(a) provides an injunctive remedy against any person who has done, or is about to do, an act prohibited by Section 203 (42 U.S.C. 2000a-3(a)).

⁴³ There is a structural similarity in the way the Civil Rights Act of 1964 attaches to both the civil rights removal statute and Section 241. Section 1443(1) permits removal to federal

words of Section 207(b) are not to be read literally to provide that no other means except an injunction is ever available to protect rights granted in Section 201 and 202 of the Act. Careful consideration of the 1964 Act as a whole, we believe, shows that the remedy provided in 18 U.S.C. 241 is available in the present circumstances.

When Congress creates a new civil right, it may be assumed that a conspiracy to oppress any citizen in the free exercise or enjoyment of that right is punishable under Section 241. In fact, it was clearly understood that the creation of the right to equal enjoyment of places of public accommodation would call that statute into play.⁴⁴ Congress could, of course, limit

court of civil or criminal cases "against any person who is denied * * * a right under any law providing for the equal civil rights of citizens of the United States * * *." Section 241 provides punishment for "persons [who] conspire to * * * intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States * * *." (Emphasis added.) In *Rachel*, the court held that the right to equal enjoyment of public accommodations is "a right under any law" under Section 1443 (342 F. 2d at 342-343). Similarly, that same right is a "right * * * secured * * * by the * * * laws" under Section 241.

⁴⁴See the colloquy between the Attorney General and committee counsel in reference to an early version of the public accommodations bill. *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88th Cong., 1st Sess., pt. II, pp. 1410-1411:

Mr. FOLEY. At this point, * * * Mr. Attorney General, as to a prosecution by you under section 241 * * *, without enacting a statute today you have action brought under the existing statute for deprivations of rights under the 14th Amendment; is that not correct?

Attorney General KENNEDY. That's right.

the extent to which Section 241 protects against interference with the new right, or it could expressly provide that Section 241 will have no application to the new right at all. But, in the absence of compelling evidence, a purpose to withdraw the sanctions of Section 241 altogether cannot be assumed where, as here, to do so would seriously jeopardize the right that Congress intended to confer.

There can be no doubt that, in passing the Civil Rights Act of 1964, Congress desired to assure all Negro citizens the right to nondiscriminatory treatment in places of public accommodation covered by the Act. So much is undeniable, as Sections 201 and 202, 42 U.S.C. 2000a, 2000a-1, make evident. In pursuing this goal, Congress directed its attention to the proprietors and employees of the establishments mentioned in the Act. Recognizing that voluntary desegregation by white businessmen was not generally to be anticipated in light of the combined pressures of competition and community sentiment,⁴⁵ Congress meant to apply only as much leverage as was

Mr. FOLEY. So therefore what you are doing, you are adding to the existing remedies today the possibility of going in on a remedy predicated upon the Interstate Commerce clause under the provisions of 241 and 242?

Attorney General KENNEDY. Yes.

⁴⁵ See Hearings Before the Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess., pt. 1, at 206 (testimony of Assistant Attorney General Marshall); *id.* at 324 (statement of Hon. Frank H. Morris); *id.*, pt. 2, at 690 (testimony of Undersecretary of Commerce Roosevelt); 110 Cong. Rec. (daily ed.) 9460-9462 (statement of Senator Humphrey).

needed to overcome these obstacles. It was felt that the federal injunctive power would provide the necessary countervailing pressure. Aware of the fact that many proprietors were compelled, for reasons of economic survival, to operate segregated facilities, Congress withdrew the criminal and civil liability provisions otherwise applicable where they might be too harsh and would not, in any event, be necessary to accomplish the congressional purpose. Thus, in explaining the first clause of Section 207(b), Senator Humphrey, after paraphrasing the language of that provision, pointed out: "This would mean, for example, that a proprietor who, in the first instance, legitimately but erroneously believes his establishment is not covered by section 201 or section 202 need not fear a jail sentence or a damage action if his judgment as to the coverage of Title II is wrong" (110 Cong. Rec. (daily ed.) 9462).

Read against this background, Section 207(b) may not properly be extended to preclude the present prosecution. To be sure, Congress limited the application of Section 241 where criminal sanctions would not be needed to accomplish actual desegregation of covered establishments. But terrorists, unconnected with any establishment, cannot claim the benefit of the Act's benevolent exemption. None of the reasons for granting the exemption applies to such individuals. Unlike the owner of a particular theater or restaurant who merely fails to accord nondiscriminatory service, they are engaged in threats, intimidation and reprisal—

dangerous and violent conduct.” They are acting from malice and are not merely responding to community pressures or fears of economic loss. Their actions, of course, do not stem from honest doubts about the coverage of Title II. And the remedy provided in the Act—“a civil action for preventive relief” (Section 204(a))—is plainly inadequate in cases such as this.

The true reading of Section 207(b), we submit, is that it makes the injunctive remedy “the exclusive means of enforcing the rights based on this title”⁴⁶ only *as against the proprietor* of a covered establishment and his agents who are denying service. They are, after all, the only persons who can finally accord the right to nondiscriminatory service, against whom “enforcement” can be compelled. That is not to say that the Act does not concern itself with outsiders. On the contrary, Section 203(b), 42 U.S.C. 2000a-2 (b), expressly forbids intimidation, threats or coercion

⁴⁶ Section 241, of course, reaches nonviolent as well as violent conspiracies. See, e.g., *United States v. Classic*, 313 U.S. 299 (altering and falsely counting ballots). But the inquiry at this point is not the scope of the criminal statute, as such, but the extent to which Section 207(b) limits that scope.

⁴⁷ The term “rights” plainly refers to those specified in Sections 201 and 202—the right to nondiscriminatory service at covered places of public accommodation and the right to service free of discrimination imposed by State law—and not the exemption from intimidation by outsiders. That is made clear by the way the term is used throughout the Title, perhaps most clearly in Section 206(a) which refers to the “full exercise of the rights herein described”—a usage wholly inappropriate to immunity from intimidation.

intended to interfere with the right of nondiscriminatory service at places of public accommodation, whether by proprietors or outsiders, and Sections 204(a) and 206(a), 42 U.S.C. 2000a-3(a), 2000a-5(a), authorize injunctive relief against such interference at the instance of an aggrieved person or the Attorney General. But that remedy, often inadequate, is not made exclusive in such cases.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be reversed and the cause remanded for trial.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 65.

UNITED STATES,
Appellant,

vs.

HERBERT GUEST, et al.,
Appellees.

BRIEF

Of Counsel for Appellee, James Spergeon Lackey.

INTRODUCTORY STATEMENT.

In the Transcript of Record filed March 29, 1965, jurisdiction postponed June 1, 1965, the following does not appear:

"United States, Appellant v. Herbert Guest et al., No. 1023.

"April 26, 1965. The motion of appellee, Lackey, for the appointment of counsel is granted and Charles J. Bloch, Esquire, of Macon, Georgia, a member of the Bar of this

Court, is appointed to serve as counsel for the appellee Lackey in this case.”

85 S. Ct. 1343 ... U. S.

Counsel so appointed and now acting and who submits this brief on behalf of Lackey was not of counsel for Lackey or any other appellee in the court below.

There, the District Court dismissed the indictment against appellees. The United States of America appealed under Title 18 U. S. C. 3731.

In the course of the opinion the court said:

“The statute upon which the government relies originated as Section 6 of the act of May 31, 1870, 16 Stat. 140. It subsequently and successively became known as Section 5508 of the Revised Statutes of 1874-1878, Section 19 of the Criminal Code of 1909, and 18 U. S. C. A. § 51, 1926 Edition, and is presently 18 U. S. C. A. § 241, 1948 edition, which reads as follows:

‘Conspiracy against rights of citizens.

‘If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

‘If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

‘They shall be fined not more than \$5,000 or imprisoned not more than ten years, or both.’ ”

(Tr. 21-22.)

It seems to me that the very first question for decision by this court is whether by reason of vagueness and uncertainty the statute is repugnant to the due process clause of the Fifth Amendment: "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

The decision of the District Judge did not rest upon this ground.

In footnote 5 of his opinion, the District Judge said:

"The Supreme Court did not reach the question of vagueness in the **Williams** case" (**United States v. Williams**, 341 U. S. 70, 95 L. Ed. 758 (1951)).

(Apparently neither did he in this case.)

However, in the dissenting opinion in the **Williams** case written by Mr. Justice Douglas, with whom Mr. Justice Reed, Mr. Justice Burton, and Mr. Justice Clark concurred, we find (pages 94-95) a discussion of vagueness concluding with this paragraph:

"In view of the nature of the conspiracy and charge to the jury in the instant case, it would be incongruous to strike § 19 down on the grounds of vagueness and yet sustain § 20 as we did in the **Screws** case."

What I am suggesting here cannot be cured by what may be alleged in the indictment, nor what may at some time be given in charge by a court to a jury. It dispenses with any argument with reference to the **Screws** case (325 U. S. 91). For in that case it was solely because of the word "wilfully" appearing in Title 18 § 242, that the Supreme Court held that section valid.

In 1939, immediately preceding the appointment to the court of Mr. Justice Douglas, the court decided **Lanzetta, et al. v. State of New Jersey**, 306 U. S. 451, and held:

"If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Cf. *United States v. Reese*, 94 U. S. 214, 221 . . . It is the statute, not the accusation under it, that prescribes the rule to govern conduct, and warns against transgression. See *Stromberg v. California*, 283 U. S. 359, 368, . . . *Lovell v. Griffin*, 303 U. S. 444, . . . No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in *Connally v. General Construction Co.*, 269 U. S. 385, 391 . . . 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' "

Recently (1964), this court has decided the cases of:

Griffin, et al. v. State of Maryland, 378 U. S. 130;
Barr, et al. v. City of Columbia, 378 U. S. 146;
Bouie, et al. v. City of Columbia, 378 U. S. 347;
Bell, et al. v. State of Maryland, 378 U. S. 226;
Robinson, et al. v. State of Florida, 378 U. S. 153.

The United States as Amicus Curiae filed a brief entitled in all of these cases (September, 1963). It was submitted by Archibald Cox, Solicitor General; Burke Marshall, As-

sistant Attorney General; Ralph S. Spritzer and Louis F. Claiborne, Assistants to the Attorney General, and Harold H. Greene and Howard A. Glickstein, Attorneys.

At pages 26-27 of that brief they wrote:

“The general rule is plain: ‘Before a man can be punished, his case must be plainly and unmistakably within the statute.’ *United States v. Brewer*, 139 U. S. 278, 288. A vague criminal statute ‘violates the first essential of due process.’ *Connally v. General Construction Co.*, 269 U. S. 385, 391. It is, like ‘the ancient laws of Caligula,’ a trap for the innocent. *United States v. Cardiff*, 344 U. S. 174, 176. The duty of warning before punishing applies equally to the States. The Fourteenth Amendment ‘imposes upon a State an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required.’ *Cline v. Frink Dairy Co.*, 274 U. S. 445, 458. See also, *Wright v. Georgia*, 373 U. S. 284; *Cramp v. Board of Public Instruction*, 368 U. S. 278; *Winters v. New York*, 333 U. S. 507, 519; *Musser v. Utah*, 333 U. S. 95, 97; *Lanzetta v. New Jersey*, 306 U. S. 451, 453.”

Mr. Justice Douglas delivered his dissent in ***United States v. Williams, et al.***, 341 U. S. 70, *supra*, April 23, 1951. The next year (December 8, 1952) he wrote for the majority in ***United States v. Cardiff***, 344 U. S. 174, using the oft-quoted language:

“The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited.. Words which are vague and fluid, cf. *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, . . . may be as much of a trap for the innocent as the ancient laws of Caligula” (page 176).

In that same brief, at page 34, appears this language:

“To be sure, the South Carolina Supreme Court decided in the instant cases that the statute applies to petitioners’ conduct. But it is well settled that the requirement of adequate forewarning is not satisfied by judicial construction of the statute in the very case in which it is challenged as too broad and indefinite. Such a retrospective interpretation ‘is at war with a fundamental concept of the common law.’ *Pierce v. United States*, 314 U. S. 306.” Then followed footnote 23:

“**Pierce** involved a statute making it criminal to pretend to be an ‘officer’ . . . ‘acting under the authority of the United States, or any Department, or any officer of the government thereof.’ It was held material error to refuse to instruct that pretending to be an officer of the TVA, a government corporation, would not be within the statutory prohibition. This Court declared (314 U. S. at 311): ‘. . . (J)udicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.’ ”

And at page 35 is a quotation from Professor Freund:

“The objection to vagueness is two fold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss.”

Mr. Justice Brennan wrote for the majority of the court in the *Bouie* case, *supra*.

At page 350, he commenced:

“The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this court. As was said in *United States v. Harriss*, 347 U. S. 612, 617,

“ ‘The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.’ ”

In that **Harriss** case, Chief Justice Warren and four Associate Justices held that the statute met the constitutional requirement of definiteness.

Toward the beginning of his opinion (p. 617) the Chief Justice wrote words which are most apt here:

“We are not concerned here with the sufficiency of the information as a criminal pleading. Our review under the Criminal Appeals Act is limited to a decision on the alleged ‘invalidity’ of the statute on which the information is based. **In making this decision, we judge the statute on its face**” (Emphasis added).

Justices Douglas, Black and Jackson dissented. Justice Clark did not participate. Justice Douglas, in writing for himself and Justice Black, used “the test of *Connolly v. General Construction Co.*, 269 U. S. 385, 391 . . .” and stated the question to be “whether **this statute** ‘either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess

at its meaning and differ as to its application'” (Emphasis added).

In the **Bouie** case, too, Justice Brennan recognized the rule of the **Connolly** and **Lanzetta** cases, *supra* (p. 351). He quoted the words above quoted from the **Pierce** case and from Professor Freund (pp. 352-3) in support of the proposition:

“There can be no doubt that a deprivation of the right of fair warning can result **not only** from vague statutory language **but also** from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language” (p. 352—emphasis added).

In footnote 5 at page 355, he used this cogent language: “We think it irrelevant that petitioners at one point testified that they had intended to be arrested. The determination whether a criminal statute provides fair warning of its prohibitions **must be made on the basis of the statute itself and the other pertinent law**, rather than on the basis of an *ad hoc* appraisal of the subjective expectations of particular defendants . . .” (Emphasis added).

Since the decision in **United States v. Williams**, *supra* (241 U. S. 70 (1951)), the court has also decided **Cramp v. Board of Public Instruction of Orange County, Florida** (1961), 368 U. S. 278. Justice Stewart wrote for the court. In part he wrote:

“We think this case demonstrably falls within the compass of those decisions of the court which hold that ‘. . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its

meaning and differ as to its application, violates the first essential of due process of law' " (p. 287).

Three years later, the Cramp case was followed and applied by the court in **Baggett et al. v. Bullit et al.**, 377 U. S. 360. There, Justice White wrote for the court. Two statutes of the State of Washington were there involved, one of 1955, one of 1931. The discussion of both is apt. The discussion of that of 1931 held to offend due process is particularly apt (p. 371).

The 1931 legislation applied to teachers, who, upon applying for a license to teach or renewing an existing contract, were required to subscribe to the following: "I solemnly swear (or affirm) that I will support the Constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States."

At pages 371-2, Justice White depicts just how difficult it would be for an affiant to determine what range of activities might be deemed inconsistent with the promise, or what might be done without transgressing the promise to promote undivided allegiance to the government of the United States. The court concluded that the oath provides no "ascertainable standard of conduct."

One of the most recent of the "void for vagueness" cases **Dombrowski et al. v. Pfister, etc., et al.**, 380 U. S. 479, 85 S. Ct. 1116 (April 26, 1965), in which the court held that that provision of the Louisiana Subversive Activities and Communist Control Law defining subversive organizations violates due process in that its language is unduly vague and uncertain and broad.

When we apply the teachings of those cases (and other similar ones* which could be discussed) to § 18-241, it is readily apparent that it, too, as written is void for vagueness.

A fortiori, when it is sought to be applied so as to embrace Fourteenth Amendment rights it is void.

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . ."

If one unlearned in the law may be presumed to know that "citizen" is not synonymous with "resident or inhabitant," he must further know what rights or privileges are secured to a citizen by the Constitution or laws of the United States.

The utter vagueness of the phrase, "any right or privilege secured to him by the Constitution or laws of the United States" is demonstrated not only by the phrase standing alone but by the hundreds of thousands of words which Justices and Judges have written since 1870 seeking to explain what the phrase did or did not embrace.

The vagueness is magnified and intensified when it is asserted that the Fourteenth Amendment confers rights or privileges upon the citizen which are covered by the statute.

* Wright v. Georgia, 373 U. S. 284;
Herndon v. Lowry, 337 U. S. 1;
Edwards v. South Carolina, 372 U. S. 229;
International Harvester Co. v. Kentucky, 234 U. S. 216;
Stromberg v. California, 283 U. S. 359;
Winters v. New York, 333 U. S. 507;
Smith v. California, 361 U. S. 147;
Cole v. Arkansas, 333 U. S. 196;
U. S. v. Cohen Grocery Co., 255 U. S. 81;
Jordan v. deGeorge, 341 U. S. 223.

That is demonstrated by part of the opinion of the majority of the Court of Appeals of the Fifth Circuit in the **Williams** case (179 F. 2d 644, 647), especially when it is considered in connection with one of the holdings in the **Boule** case, *supra*.

Judge Sibley wrote there:

“The indictment (under what is now Title 18, § 2417) follows the statute in its generalities, and is sufficient in its specifics to be a good criminal pleading, and if it fails to allege a crime it is because the statute fails validly to create such a one. The failure lies in the application of the statute to the provisions of the Fourteenth Amendment, ‘Nor shall any State deprive any person of life, liberty, or property, without due process of law,’ because of the extreme vagueness of the quoted clause. Reference is made to the discussions of a similar question touching Sec. 20 in *Screws v. United States*, 325 U. S. 91 . . . wherein by a closely divided court that statute was upheld because it provided that ‘wilful’ violations only were to be crimes, and that meant that the accused, exercising the power of the State, not only deprived another of a federally secured right, but knew it was such, and wilfully flouted the Constitution and laws of the United States. The indictment does not charge these defendants with ‘wilfulness,’ nor does the statute mention it, and the judge refused to give the jury on request charges that ‘wilfulness’ was a necessary element of the case. 2. The Congress and the federal court are themselves faced here with the provision of the Fifth Amendment that ‘No person shall . . . be deprived of life, liberty or property, without due process of law,’ and it is found right in the midst of provisions in the Fifth and Sixth Amendments about federal prosecutions for crime. It is well

understood that 'due process' applies not only to court procedure, but also to legislation, especially in criminal matters. There are no common law federal crimes, but all are created by statute, though common law words in the statute may take their intended meaning from the common law. Not only must the accusation inform the accused for what he is to be tried, but due process requires that the statute must inform the citizen in advance by a reasonably ascertainable standard what the crime shall be. A judge may not establish the standard, save by reasonable interpretation, after the deed is done, for that is in substance to give the statute life *ex post facto*, which the Constitution forbids also. All this we understood to be admitted by all the justices in the opinions in the Screws case. The word 'wilful' in Sec. 20 was held by the majority to mean that the accused knew the federal right existed and intentionally and purposely violated it, and his knowledge and wilfulness made him a criminal. . . ."

Consider what is said there as to "ex post facto" in connection with one of the holdings of the court in the Bouie case, *supra*, and the unconstitutional vagueness of § 18-241 (which was § 19 at the time of the decision in the Williams case in the Fifth Circuit) is convincingly demonstrated.

There, following the Pierce case, the court on June 22, 1964, said:

"Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids."

Had the appellee, Lackey, been learned in the law and seeking to determine whether Fourteenth Amendment

rights were embraced in § 241, he would have found that four Justices of the Supreme Court had as late as 1951 concurred in an opinion which concluded:

“We therefore hold that including an allegation that the defendants acted under color of State law in an indictment under § 241 does not extend the protection of the section to rights which the Federal Constitution merely guarantees against abridgement by the States.”

He would have found that the Supreme Court of the United States had in **United States v. Powell**, 212 U. S. 564, affirmed a lower Federal Court holding that participants in a mob which seized a Negro from the custody of a local sheriff and lynched him were not indictable under § 241.

He would have found that a former Chief Justice of the United States (Mr. Charles E. Hughes) had said in argument to the Court:

“The provisions of the Fourteenth Amendment are also concerned with action by the States and do not confer a federal right to protection as against the action of individuals, in the absence of action by a State.”

United States v. Wheeler, 254 U. S. at page 291.

He would have found that argument impliedly accepted by the Supreme Court in that case, and that the Court then included Justices Holmes and Brandeis.

He would have been entitled to the protection of that rule of law reiterated by the Court in the *Bouie* case, *supra*:

A court, in giving retroactive application to its new construction of a statute, deprives persons of their right

to fair warning of a criminal prohibition and thus violates the Due Process clauses of the Amendments to the Constitution.

I respectfully suggest that the Court need proceed no further in its consideration of this appeal. A judgment of affirmance is, under applicable decisions, demanded.

“ . . . it is well established that an appellee in whose favor a judgment has been rendered is entitled to an affirmance on any proper ground.”

Mr. Justice Black, in **Cameron v. Johnson**, 85 S. Ct. at page 1754, footnote 6.

If the Court should not consider the vagueness of § 18-241 a “proper ground” for affirmance of the judgment below, we would pass to a discussion of the question as posed by Appellants:

I.

“Whether Section 241 of the Criminal Code reaches unofficial conspiracies against the exercise of rights secured by the Fourteenth Amendment.”

(Jurisdictional Statement, page 2.)

In **United States v. Williams et al.**, 341 U. S. 70, 82, affirming 179 F. 2d 644, Justices Frankfurter, Chief Justice Vinson, Justices Jackson and Minton, held:

“ . . . that including an allegation that the defendants acted under color of State law in an indictment under § 241 does not extend the protection of the section to rights which the Federal Constitution merely guarantees against abridgement by the States. Since under this interpretation of the statute the indictment must fall, the judgment of the court below is affirmed.”

On the preceding page of the opinion, they had written:

“But the validity of a conviction under § 241 depends on the scope of that section which cannot be expanded by the draftsman of an indictment.”

The decision of the court below was affirmed, though Justice Black for reasons other than those expressed by the Justices named, thought the convictions “must fail” (op. cit. p. 86).

Justice Douglas, with whom Mr. Justice Reed, Mr. Justice Burton, and Mr. Justice Clark concurred, dissented.

As I read the dissenting opinions, the dissenting Justices there would not have held that § 241 applied to “unofficial” conspiracies. I think this conclusion is justified by what was written by Justice Douglas at pages 91-2 (341 U. S.). It is also justified by the opinion of Justice Douglas in the companion case of **Williams v. United States**, 341 U. S. 97, wherein the Justice described Williams as a “special police officer who in his official capacity subjects a person . . . to force and violence . . .” See also the Chief Justice’s recognition of Williams’ status in **Griffin v. State of Maryland**, 378 U. S. 133, 135. The excerpt I have in mind commences: “Thus in **United States v. Mosley**, 238 U. S. 383, 387, Mr. Justice Holmes observed that § 19 ‘dealt with federal rights, and with all federal rights.’” Regardless of what else might be said to this clause and its context, it appears that immediately after using it Justice Holmes recognized the validity of **United States v. Reese**, 92 U. S. 214, and it appears also that the conspirators were **election officers** who conspired to “injure and oppress qualified voters . . . in the exercise of their right to vote for members of Congress . . .” (p. 383). They were not ordinary individuals. As was said by the

Court later in **United States v. Raines** (1960), 362 U. S. 17, 25, “. . . it is enough to say that the conduct charged—discrimination by state officials, within the course of their official duties, against the rights of United States citizens, on grounds of race or color—is certainly, as ‘state action’ and the clearest form of it, subject to the ban of that amendment, . . . It is, however, established as a fundamental proposition that every state official, high and low, is bound by the Fourteenth and Fifteenth amendments.”

Next in the excerpt is: “. . . Fourteenth Amendment rights have sometimes been asserted under § 19 and denied by the Court. That was true in *United States v. Cruikshank*, 92 U. S. 542, . . . But the denial had nothing to do with the issues in the present case. The Fourteenth Amendment protects the individual against **state action**, not against wrongs done by **individuals** (The emphasis is his). See *Civil Rights Cases* 109 U. S. 3, . . . *Shelley v. Kraemer*, 334 U. S. 1, . . . The *Cruikshank* case, like others, involved wrongful action by **individuals** who did not act for a state nor under color of state authority.”

The other cases, listed in footnote 4 (p. 92), to which reference was made were **Hodges v. United States**, 203 U. S. 1, . . . **United States v. Powell**, 151 Fed. 648, affirmed 212 U. S. 504 . . . ; **United States v. Wheeler**, 254 U. S. 281, 298.*

So I submit that I am justified in my conclusion that there would have been no such dissent in the *Williams* case had the conspiracy been an “unofficial” one; had the dissenting Justices not deemed *Williams, et al.* to be acting under color of State law. Indeed, the main opinion

* At page 93, Justice Douglas calls attention to the fact that the failure to apply § 19 to protection of Fourteenth Amendment rights arose because the action complained of was *individual* action, not *state* action.

(at pages 80, 81) alludes to the Hodges, Wheeler, and Powell cases, and states that in none of them "was it alleged that the defendants acted under color of State law" (p. 81).

So, as I read the Williams case, Justice Frankfurter, Chief Justice Vinson, Justice Jackson, and Justice Minton were of the view that § 241 **did not** apply even to interferences by state officers with rights which the federal government merely guarantees from abridgement by the State; Justices Douglas, Reed, Burton and Clark were of the view that § 241 **did** apply to interferences by **state officers** with rights which the federal government merely guarantees from abridgement by the State; no one of the Justices was of the view that § 241 applied to actions of private individuals against private individuals with respect to rights which the Constitution merely guarantees from interference by a State.

That this conclusion is justified is demonstrated by a review of the cases construing and applying § 241 (as numbered variously from time to time).

It may be well to commence this review with another quotation from the dissent written by Justice Douglas in the **Williams** case, *supra*:

"Section 19 has in fact been applied to the protection of rights under the Fourteenth Amendment. See *United States v. Hall*, 26 Fed. Cas. page 79, No. 15,282; *United States v. Mall*, 26 Fed. Cas. page 1147, No. 15,712; *Ex parte Riggins*, 134 Fed. 404, writ dismissed, 199 U. S. 547, 26 S. Ct. 147, 50 L. Ed. 303."

341 U. S. at 92-93;

71 S. Ct. at 593.

The Hall case cited was decided by Circuit Judge Woods sitting in the Circuit Court Southern District of Alabama

in May of 1871. It involved an indictment for a violation by individuals of the 6th section of the act of Congress of May 31, 1870 (16 Stat. 140) known as the "Enforcement Act." The indictment was held valid.

The same court in 1871 decided the Mall case similarly.

Judge Woods was a native of Ohio, a general in the Union Army during the War between the States. After the war, he settled in Alabama, of which state he was appointed Chancellor. Later, President Grant appointed him United States Circuit Judge for the Fifth Circuit. In 1881, Judge Woods became Justice Woods by his appointment to the Supreme Court by President Hayes.

As Circuit Justice, on July 6, 1882, in **LeGrand v. United States**, 12 Fed. 577, he declared § 5519 of the Revised Statutes (Part of § 2 of the Act of April 20, 1871), unconstitutional because "decisions of the Supreme Court" which he cited "leave no constitutional ground for the act to stand on."

The decisions he cited were **United States v. Reese**, 92 U. S. 214; **United States v. Cruikshank**, 92 U. S. 542; **Virginia v. Rives**, 100 U. S. 313.

It is noteworthy that forty years later (1920) between the time Justice Hughes was a Justice of this court (1910-1916), and the time he became Chief Justice (1930), he as counsel, argued before the court **United States v. Wheeler, et al.**, 254 U. S. 281. Therein (p. 291) he argued "The provisions of the Fourteenth Amendment are also concerned with action by the States and do not confer a federal right to protection as against the action of individuals, in the absence of action by a State." For that proposition he cited, *inter alia*, **Cruikshank** and **Rives**.

So in 1882, Justice Woods had cited Cruikshank and Reese in holding: "Where a state has been guilty of no

violation of the provisions of the thirteenth, fourteenth and fifteenth amendments to the constitution of the United States, no power is conferred upon Congress to punish private individuals who, acting without any authority from the State, and it may be in defiance of law, invade the rights of the citizen which are protected by such amendments."

LeGrand v. United States, 12 Fed. 577 (July 6, 1882).

At the following October Term of the Supreme Court, Justice Woods wrote for the court in holding § 5519 (originally a part of Section 2 of the act of April 20, 1871) unconstitutional.

United States v. Harris, 106 U. S. 629.

So disappeared any impact which the Hall and Mall cases may have had on the case at bar. Justice Woods, who, as Judge Woods, had decided them, realized and held in **LeGrand** that **Cruikshank** and **Reese** and **Rives** were then controlling. And a few months later writing for the Supreme Court, he again so held as to § 5519.

Ex parte Riggins, 134 Fed. 404 ("writ dismissed, 199 U. S. 547"), is also cited in this connection in the dissenting opinion in **Williams**.

Riggins is intertwined with **United States v. Powell**, 151 Fed. 648, affirmed, 212 U. S. 564, cited by Justice Douglas at page 93 of 241 U. S.

The report of **Riggins** (199 U. S. 547), shows that **Riggins** and **Powell** were indicted under §§ 5508, 5509 in the District Court for the Northern Division of the Northern District of Alabama in 1904. A severance was ordered as between **Powell** and **Riggins**. **Riggins** filed his petition for *habeas corpus*. The District Judge discharged the writ and remanded **Riggins** to custody. The opinion of

the District Judge is reported 134 Fed. 404. The Supreme Court quashed the writ and dismissed the petition for habeas corpus.

The author of a note in American Law Reports Annotated (162 A. L. R. at page 1386 (e)), says:

"In *United States v. Powell* (1909), 212 U. S. 564 . . . (affirming 1907 . . . 151 Fed. 648, and adopting the opinion therein), the statute was held to afford no protection against the act of private individuals in taking a prisoner from the state officers and murdering him to prevent his trial. But in *ex parte Riggins* (1904: C. C.), 134 Fed. 404, involving the sufficiency of an indictment based upon the same facts the court held that the statute did give such protection provided there was no attempt to alter or interfere with the state laws or the authority of its officers in executing them. The case was reversed (sic) in (1905) 199 U. S. 547 . . . on other grounds.* In *United States v. Powell* (U. S.) *supra*, the government urged the court to adopt the position taken by the Circuit Court in *ex parte Riggins*, but since the Supreme Court did not go into the question on appeal, the court held that taking a prisoner from state officers and murdering him did not constitute an impairment of the right of trial by jury, the court citing *Hodges v. United States* (1906), 203 U. S. 1 . . . where it was held that the Thirteenth Amendment did not empower Congress to make it an offense for private individuals to impair employment and contract rights of negroes because of race, color, or previous condition of servitude."

* As a matter of fact, it was not "reversed." The writ of error was quashed, and the petition dismissed because it had been sought to substitute it for a writ of error.

The same Judge, Judge Thomas Goode Jones,** wrote the opinions in **Riggins** and **Powell**. The difference in his holdings is explained at the beginning of his opinion in **United States v. Powell**, 151 Fed. at p. 650, as follows:

“When the court discharged the writ of habeas corpus sued out by Riggins, it decided the questions raised by the demurrer adversely to the contention now made by this defendant. *Ex parte Riggins* (C. C.), 134 Fed. 404. Since that decision, the Supreme Court has decided the *Hodges* case, 27 S. Ct. 6, 51 L. Ed. ...,*** which held, in effect, contrary to the decision of Justice Bradley in *United States v. Cruikshank*, 1 Woods 308, Fed. Cas. No. 14,897, that the rights and immunities claimed here under the thirteenth amendment were not secured under the Constitution or laws.”

He proceeded to sustain the demurrer to the indictment and the Supreme Court affirmed him (212 U. S. 564) on the authority of the *Hodges* case.

Variouslly labeled but with its contents the same, what is now § 241 has been many times, since **Cruikshank**, considered by the Court over the years.

1884—*ex parte Yarbrough*, 110 U. S. 651.

“Stripped of its technical verbiage, the offense charged in this indictment* is that the defendants conspired to intimidate Berry Saunders, a citizen of African descent, in the exercise of his right to vote for a member of the Congress of the United States, and in the execution of that conspiracy they beat,

** Judge Jones was the aide of General John B. Gordon at the surrender at Appomattox. He was appointed to the Federal bench by President Theodore Roosevelt. He was the father of the late Judge Walter B. Jones (See 357 U. S. 449).

*** 203 U. S. 1.

* Presented by Emory Speer, U. S. Attorney, who afterwards as *United States Judge* presided in *U. S. v. Lancaster*, 44 Fed. 885.

bruised, wounded and otherwise maltreated him; and in the second count that they did this on account of his race, color and previous condition of servitude, by going in disguise and assaulting him on the public highway and on his own premises."

(op. cit. 657.)

The Court held that the indictment stated an offense under §§ 5508, 5520 of the Revised Statutes. The reason for the holding was that Saunders' right to vote in an election for Representatives in Congress was a right based upon the Constitution "and Congress has the constitutional power to pass laws for the free, pure and safe exercise of this right" (p. 652).

While Cruikshank is not cited by name, at pages 665-6 the Court said:

"The reference to cases in this court in which the power of Congress under the first section of the Fourteenth Amendment has been held to relate alone to acts done under State authority, can afford petitioners no aid in the present case. For, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a State, or which are not committed by any one exercising its authority, are not within the scope of that amendment, it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself."

The Court therein also said: "The power arises out of the circumstance that the function in which the party is engaged, or the right which he is about to exercise, is de-

pendent on the laws of the United States." (Emphasis added.)

1884—United States v. Waddell et al., 112 U. S. 76.

The Court at page 80 quoted the language from the *Yarborough* case just above quoted. It held that the exercise by a citizen of the United States of the right to make a homestead entry upon unoccupied public lands conferred by Revised Statutes § 2289 was the exercise of a right secured by the Constitution and laws of the United States within the meaning of § 5508. The Court specifically stated: "The protection of this section extends to no other right, to no right or privilege dependent on a law or laws of the State. Its object is to guarantee safety and protection to persons in the exercise of rights dependent upon the laws of the United States, including of course, the Constitution and treaties as well as statutes, and it does not, in this section at least, design to protect any other rights" (p. 79). Also, "The right here guaranteed is not the mere right of protection against personal violence."

1887—Baldwin v. Franks, 120 U. S. 678.

As to § 5508, the question was whether what Baldwin was charged with constituted an offense within the meaning of its provisions, i. e. was he charged with conspiring with respect to a right or privilege secured to a citizen by the Constitution or laws of the United States? He was charged with "conspiring . . . to deprive certain subjects of the Emperor of China 'of the equal protection of the laws and of equal privileges and immunities under the laws'" as guaranteed to them by treaties between the United States and the Emperor of China.

The court held the word "citizen" in R. S. 5508 is used in the political sense as in the Fourteenth Amendment and not as being synonymous with "resident," "inhabitant," or "person."

Said the court: "It is used in connection with the rights and privileges pertaining to a man as a citizen, and not as a person or inhabitant" (pp. 691-692).

In this case, too, the court held § 5519 unconstitutional as a provision for the punishment of a conspiracy, within a state, to deprive an alien of rights guaranteed to him therein by a treaty of the United States. (**United States v. Harris**, 106 U. S. 629, *supra*, followed.)

1892 (April 4) **Logan v. United States**, 144 U. S. 263.

This decision (by six Justices) holds that a citizen of the United States, in the custody of a United States marshal under a lawful commitment to answer for an offense against the United States, has the right to be protected by the United States against lawless violence; this right is a right secured to him by the Constitution and laws of the United States; and a conspiracy to injure or oppress him in its free exercise or enjoyment is punishable under section 5508 of the Revised Statutes.

This case was argued in January, 1892. Logan was represented by Mr. A. H. Garland, who in President Cleveland's first administration (1885) had been Attorney General of the United States.*

In the course of the opinion the court alluded to the cases theretofore decided by the court, so strongly relied upon by "learned counsel," discussed them in detail, and distinguished them from the case at bar. The cases so discussed were **Reese**, **Cruikshank**, **Strauder**, **Ex parte Virginia**, **United States v. Harris**, **Civil Rights cases**, **Ex parte Yarbrough**, **Waddell**, **Baldwin v. Franks**, *supra*.

The court specifically distinguished **Harris** by saying: "The case is clearly distinguished from the case at bar by the facts that those prisoners were in the custody of

* And, see *Ex parte Garland*, 71 U. S. 333.

officers, not of the United States, but of the State, and that the laws, of the equal protection of which they were alleged to have been deprived, were the laws of the State only" (p. 290).

Of this whole series of decisions the court said:

"The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the Amendments to the Constitution, are thereby guaranteed only against violation or abridgement by the United States, or by the States, as the case may be, and **cannot therefore be affirmatively enforced by Congress against unlawful acts of individuals**; yet that every right, created by, arising under or dependent upon, the Constitution of the United States, may be protected and enforced by Congress, by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object" (op. cit. p. 293).

These cogent words which furnish the yardstick for measuring the rights of this appellee were written by Mr. Justice Gray of Massachusetts. Among those who concurred were Chief Justice Fuller and Associate Justice Harlan.

Justice Gray proceeded:

"Among the particular rights which this court . . . has adjudged to be secured, expressly or by implication, by the Constitution and laws of the United States, and to be within section 5508 of the Revised Statutes . . . are the political right of a voter to be protected from violence while exercising his right of

suffrage under the laws of the United States; and the private right of a citizen, having made a homestead entry (under the laws of the United States), to be protected from interference while remaining in the possession of the land for the time of occupancy which Congress has enacted shall entitle him to a patent." (293-4).

"In the case at bar," said the court, "the right in question does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action. Any government which has power to indict, try and punish for crime, and to arrest the accused and hold them in safekeeping until trial must have the power and the duty to protect against unlawful interference its prisoners so held, as well as its executive and judicial officers charged with keeping and trying them" (p. 294).

The principle of **In re Neagle**, 135 U. S. 1, was applied.

(The Chief Justice concurred though he had dissented in **In re Neagle**.)

The gist of both **Neagle** and **Logan** was thus stated: "The United States are (sic) bound to protect against lawless violence all persons in their (sic) service or custody in the course of the administration of justice. This duty and the correlative right of protection are not limited to the magistrates and officers charged with expounding and executing the laws, but apply with equal force, to those held in custody on accusation of crime, and deprived of all means of self-defense" (p. 295).

Mr. Justice Lamar (L. Q. C.) did not concur in the opinion of the court on the construction of section 5508 of the Revised Statutes.

As Circuit Justice, Justice Lamar had (in October, 1891) the year before presided (with Judge Newman) in the case of **United States v. Sanges et al.**, 48 Fed. 78.

Citing many of the cases which have been herein cited, and also **Slaughter House cases**, 16 Wall. 36, he held:

“The amendments to the Constitution of the United States, including especially section 1 of the Fourteenth Amendment, so far as they relate to the rights of individuals, are intended to prevent the States and the United States, or any persons acting under their authority, from interfering with existing rights, and do not confer any new rights; and hence one cannot claim that his right to testify before a federal grand jury without interference from private individuals is one conferred by the Constitution of the United States, within the meaning of R. S., U. S., §§ 5508, 5509, which prescribe a punishment for any persons ‘who conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution of the United States, or because of his having so exercised the same.’ *Ex parte Yarbrough* . . . ; *U. S. v. Waddell*, . . . ; *State v. Lancaster*, 44 Fed. Rep. 896, distinguished” (p. 78).

The United States filed a writ of error. It was dismissed because such writ did not lie in behalf of the United States in a criminal case.

United States v. Sanges, 144 U. S. 310.

1895—**In re Quarles**, 158 U. S. 532.

Following *In re Neagle*, *supra*, and *United States v. Logan*, *supra*, the Court, speaking through Justice Gray, held that it is the right of every United States citizen to inform a marshal of a violation of federal laws; this right

is secured to the citizen by the Constitution of the United States; and a conspiracy to injure such citizen in the free exercise of enjoyment of such right is punishable under § 5508.

The Chief Justice (Fuller) dissented.

1900—Motes v. United States, 178 U. S. 458.

Yarbrough, Waddell and **Logan** cases applied in upholding indictment for conspiracy to oppress one Thompson because of his having informed Federal authorities of violations by conspirators of Federal laws.

1906—Hodges v. United States, 203 U. S. 1.

“ . . . whether a conspiracy or combination to forcibly prevent citizens of African descent, **solely because of their race or color**, from disposing of their labor by contract upon such terms as they deem proper and from carrying out such contract, infringes or violates a right or privilege created by, derived from or dependent upon the Constitution of the United States” was the question involved. It was answered negatively, two Justices dissenting.

This case is particularly important because it was the authority for the decision in:

1909—United States v. Powell, 212 U. S. 564, which has been previously discussed, and which affirmed **United States v. Powell**, 151 Fed. 648.

1915—Guinn et al. v. United States, 238 U. S. 347.

This case declared the so-called Grandfather Clause of the amendment to the constitution of Oklahoma of 1910 to be void as violative of the Fifteenth Amendment.* It

* Note: This case also categorically holds: “The establishment of a literacy test for exercising the suffrage is an exercise by the State of a lawful power vested in it not subject to the supervision of the Federal courts.”

involved the responsibility of election officers under § 5508 and § 19 for preventing people from voting in mistaken reliance upon the protection of the Oklahoma provision. This question was also before the Court in the **Mosley** case decided the same day.

1915—United States v. Mosley, 238 U. S. 383.

This case, which had been submitted October 17, 1913, held that § 19 and § 5508 apply to the acts of two or more election officers who conspire to injure and oppress qualified voters in the exercise of their right to vote for member of Congress by omitting the votes cast from the count and the return to the state election board.

The crux of this case is succinctly stated at page 386 by Justice Holmes: "It is not open to question that this statute is constitutional,* and constitutionally extends some protection at least to the right to vote for members of Congress. Ex parte Yarbrough, 110 U. S. 651. Logan v. United States, 144 U. S. 263, 293. We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put the ballot in a box."

Justice Joseph Rucker Lamar of Georgia dissented.

This case was relied upon by the government in the group of cases originating in the State of Ohio, and reported

1918—United States v. Bathgate et al. (and companion cases), 246 U. S. 220.

There the Court, which included Justice Holmes, who had written the opinion in **Mosley**, supra, and Justice Brandeis, would not extend the ruling in **Mosley** or **Yar-**

* The "void for vagueness" attack was not made.

brough or Waddell or Logan to a "conspiracy to bribe voters at a general election within a State where presidential electors, a United States senator and representative in Congress were chosen.

"The real point involved is whether § 19 denounces as criminal a conspiracy to bribe voters at a general election within a State where presidential electors, a United States senator and a representative in Congress are to be chosen. **Our concern is not with the power of Congress but with the proper interpretation of action taken by it.** This must be ascertained in view of the settled rule that 'there can be no constructive offenses, and before a man can be punished his case must be plainly and unmistakably within the statute' (United States v. Lasher, 134 U. S. 624, 628)" (Emphasis is added.)

1920—United States v. Wheeler, 254 U. S. 281.

I think that of all the cases construing the statute involved this is the most pertinent and applicable.

The "right" there involved was the right "to move at will from place to place, . . . to have free ingress thereto and egress therefrom."

The District Court in 254 Fed. 611 (1918), had held that § 19 had the same meaning when it was enacted as § 6 of the Act of May 31, 1870. "As there enacted it was intended to protect the political rights of citizens of the United States in the several states and not their civil rights as mere persons, residents or inhabitants. Baldwin v. Franks, 120 U. S. 678 . . ." (h. n. 5).

At page 616 (of 254 Fed.) the Assistant Attorney General was quoted as saying in his brief:

"We admit that the fundamental rights of a person as such, or of a citizen as such are not secured to him by the Constitution of the United States . . ."

“For example, ordinarily the right to remain in any one place, or to move freely from place to place is not secured by the Constitution . . .”

But, he contended that “if state boundaries are brought into the question, if the right claimed be to remain in one of the several states of the federal union, as distinguished from another, or to move freely from one of the several states into another state of the federal union, it then becomes a right secured by the Constitution of the United States.” Citing **Crandall v. Nevada**, 6 Wall. 35.

His contention was rejected by Circuit Judge Morrow who after summarizing Crandall said: “We do not see how the decision of the Supreme Court in Crandall . . . can be held decisive of this case.”

On appeal, the Supreme Court affirmed, Chief Justice White writing, Justices Brandeis and Holmes among those concurring, and only Justice Clark dissenting.

The government had continued its reliance upon **Crandall**. As to it, the Court said:

“This leads us furthermore to point out that the case of **Crandall v. Nevada**, 6 Wall. 35, so much relied upon in the argument, is inapplicable, not only because it involved the validity of state action, but because the state statute considered in that case was held to directly burden the performance by the United States of its governmental functions and also to limit rights of the citizens growing out of such functions . . .”

(p. 299).

The District Judge below apparently relied heavily on Wheeler as is shown by his frequent citations of it in his opinion (Tr. 28, 33).

1940—**United States v. Powe**, 309 U. S. 679.

Here, the Court composed of Chief Justice Hughes, and Associate Justices McReynolds, Stone, Roberts, Black, Reed, Frankfurter, Douglas and Murphy, denied the government's petition for writ of certiorari in the case reported, 109 F. 2d 147.

This case is alluded to by Justice Douglas in his dissent in **Williams** (341 U. S. at page 93) in such manner as to indicate his belief in the correctness of it as decided by Circuit Judges Sibley, Hutcheson and McCord.

Their opinion is worthy of consideration, too, because they, too (p. 150) relied on Wheeler.

Despite the Court's refusal to grant the application for certiorari in **Powe**, it on October 16, 1950, granted the application of the government in the **Williams** case (340 U. S. 849) because "important questions in the administration of civil rights legislation are raised" (341 U. S. 72).

1951—**United States v. Williams et al.**, 341 U. S. 70, was the result.

Wheeler was cited and relied upon by Justices Frankfurter and those concurring with him (op. cit. 77-8; 80).

It is cited in footnote 4, page 92, by Justice Douglas in connection with his statement that "The Cruikshank case, like others (including Wheeler) involved wrongful action by **individuals** who did not act for a state nor under color of state authority" (Emphasis his).

That quotation and his language at page 93 heretofore quoted leads to the inescapable conclusion that the dissenters in **Williams** had no quarrel with Wheeler, and other cases like it. Their dissent was based on the premise that Williams' action was not mere individual action.

Therefore, even in the light of the dissent in **Williams**, the truism stated by Judge Hughes in his argument in **Wheeler** remains the undisputed law of the land:

“The provisions of the Fourteenth Amendment are also concerned with action by the States and do not confer a federal right to protection as against the action of individuals, in the absence of action by a State.”

This thesis, established in the **Wheeler** case, is also supported almost uniformly by decisions of the Federal Courts, other than the Supreme Court.

1871—United States v. Hall, 26 Fed. Cases, p. 79 (Has been previously discussed).

1871—United States v. Crosby, Fed Case # 14,893, Circuit Court—D. S. C.

“The right to be secure in one’s house is not a right derived from the constitution. It existed long before the adoption of the constitution, at common law, and cannot be said to come within the meaning of the words of the act, ‘right, privilege, or immunity granted or secured by the constitution of the United States.’ ”

“Congress has power to interfere for the protection of voters at federal elections, and that power existed before the adoption of the fourteenth or fifteenth amendments to the constitution.”

1874—United States v. Blackburn, Fed. Case # 14,603.

District Judge Krekel (W. D. Mo.) charged the jury:

“The offenses charged consist in the conspiring together for the purpose of depriving colored citizens as a class of equal protection of the laws and of equal privileges and immunities to which they are entitled. At the present stage of the case, the

indictment must be treated, not only as charging an offense against the laws of the United States but as doing so in due form of law. No inquiry or suggestion as to the constitutionality of the law will therefore be proper, or indulged in."

1882—LeGrand v. United States, 12 Fed. 577 (Heretofore discussed).

1890—United States v. Lancaster, 44 Fed. 885.

A citizen of another state who had obtained a decree in a federal court in Georgia settling title to land has the right to proceed by contempt in such court against people violating the injunction which right was secured to him under the Judicial power (Art. 3, § 2, par. 1).

(This case was tried before Judge Emory Speer who had been United States Attorney in the prosecution which gave rise to the Yarbrough decision, supra.)

1891—United States v. Sanges, 48 Fed. 78 (Heretofore discussed).

1893—United States v. Patrick, 54 Fed. 338 (U. S. D. C. Tenn.).

Revenue officers engaged in a search for distilled spirits illegally concealed are exercising a right secured to them by the laws of the United States, and an indictment charging the killing by defendants of such officers while exercising such rights, and while defendants were engaged in a conspiracy to injure or oppress such officers is sufficient under § 5508.

The opinion was written by Circuit Judge Howell E. Jackson, February 1, 1893. He was commissioned Associate Justice of the Supreme Court, February 18, 1893.

He at page 351 quoted from *U. S. v. Cruikshank*, supra, 92 U. S. 553, 554, and wrote:

"Upon this distinction between rights and privileges existing independent of the constitution or laws of the United States, and those rights and privileges which are created or secured by said constitution depends the authority of Congress to legislate for the protection of citizens. Sections 5508 and 5509 are confined to rights or privileges of the latter class, and can never be allowed to extend to offenses affecting rights or privileges of citizens which exist by state authority, independent of the constitution or laws of the United States." (Emphasis added.)

This case was one of those relied upon by the government in the Wheeler case, *supra*, and was distinguished by the court (254 Fed. at pp. 617-8).

1903 (February 24)—**Karem v. United States**, 121 Fed. 250.

Decided by Judges Lurton, Day and Severens, comprising the Circuit Court of Appeals, Sixth Circuit. Judge Lurton (of Tennessee) afterwards (1910) became an Associate Justice of the Supreme Court of the United States. Judge Day (of Ohio) was appointed Associate Justice of the Supreme Court February 25, 1903, the very day after this decision.

" . . . § 5508 . . . is not appropriate legislation for the enforcement of the fifteenth constitutional amendment, both because it relates to the acts of individuals, and not of a state, and because it is broader in its terms than the legislation authorized by the amendment; and it will not sustain an indictment for conspiracy to prevent a citizen from voting at a purely state or municipal election on account of his race or color, whether the defendants are charged as individuals, or as officers of the state" (h. n. 3). At page 261, the Court said:

“Assuming that exemption from discrimination at a state election is a ‘right or privilege secured by the Constitution or laws of the United States,’ it is a right which originates only in the fifteenth amendment, and **can only be enforced by legislation directed to state action in some form**, by which otherwise qualified voters are denied the elective franchise on account of race or color. This is the limit of the power of Congress under the article. Section 5508 is not so limited, and is not, therefore, appropriate legislation for the enforcement of the fifteenth amendment” (p. 261, Emphasis added).

There was no appeal from this decision (304 F. 2d 603).
1899—**United States v. Eberhardt**, 127 Fed. 254 (N. D. Ga.).

The object of the conspiracy charged under § 5508:

(1) Deprivation of the “right and privilege of contracting and being contracted with”; (2) right and privilege of personal security, that is . . . and the right and privilege of personal liberty, that is moving and going wherever he, the said Thomas Bush, desired, without restraint or control.”

Demurrer to the indictment sustained on authority of **In re Quarles**, 158 U. S. 532, **Cruikshank v. U. S.**, 92 U. S. 542. The court said that it was no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a state than it would be to punish for false imprisonment.

1903—**United States v. Morris**, 125 Fed. 322 (D. C. Ark.).

“A conspiracy to prevent negro citizens from exercising the right to lease and cultivate land because they are negroes, is a conspiracy to deprive them of a right secured to them by the Constitution and laws

of the United States within the meaning of . . .
§ 5508."

(This case was not appealed.) The last paragraph of the opinion shows how mistaken the District Judge was.

1900—United States v. Lackey, 99 Fed. 952 (D. C. Ky.).

§ 5508 not limited to elections for representatives in Congress when allegation made that oppression was on account of their race or color.

Reversed, 1901, Circuit Court of Appeals, Sixth Circuit, Judges Lurton, Day and Severens, 107 Fed. 114.

1904—United States v. Moore, et al., 129 Fed. 630.

"The right of a citizen to organize . . . laborers . . . as well as the right of individuals . . . to unite for their own improvement or advancement . . . is a fundamental right of a citizen in all free governments, but it is not a right, privilege or immunity granted or secured to citizens of the United States, by its constitution or laws, and is left solely to the protection of the States."

"The fourteenth amendment of the Federal Constitution adds nothing to the rights of any citizen against another, but merely furnishes additional guaranties against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."

"Federal courts have no jurisdiction to punish a conspiracy to oppress and intimidate a citizen . . . to prevent him from exercising the right to establish a miner's union in a state . . ."

1904—Riggins, Ex Parte, 134 Fed. 404.

(heretofore discussed)

1907—Smith v. United States, 157 Fed. 721.

A conspiracy to deprive any citizen of the right to freedom from slavery or involuntary servitude, one secured to every person within the jurisdiction of the United States by the thirteenth amendment, is indictable under § 5508.

1915—United States v. Aczel, et al., 219 Fed. 917 (D. C. Ind.).

Right to vote for Representatives and Senators are rights secured by Constitution and laws of the United States within § 19.

Affirmed **Aczel et al. v. United States**, 232 Fed. 652 (C. C. A. 7).

1916—Buchanan v. United States, 233 Fed. 257 (C. C. A. 8).

Intent is an essential of an offense under § 19, and where defendants believed that one of their number was entitled to improvements upon an unperfected homestead belonging to another, and in good faith went upon land and removed the improvements, they are not guilty.

1919—Chavez v. United States, 261 Fed. 174 (C. C. A. 8).

Follows **United States v. Bathgate**, supra, and distinguishes **United States v. Mosley**, 238 U. S. 383.

1920—Foss v. United States, 266 Fed. 881 (9th Cir.).

Indictment for conspiracy to intimidate citizens in the exercise of their right to appear and testify on behalf of contentants in cases involving lands entered upon under the laws of the United States. Indictment held good. Reference made to **Logan v. United States**, supra.

1921—Anderson v. United States, 269 Fed. 65 (C. C. A. 9).

Conspiracy to intimidate citizens by seeking to prevent them from furnishing supplies to the government for war purposes indictable under § 19.

1922—**Roberts v. United States**, 283 Fed. 960 (C. C. A. 8).

Conspiracy to prevent persons from acquiring title under the Homestead Act indictable under § 19.

1923—**Nixon v. United States**, 289 Fed. 177 (9th Cir.).

Indictment under § 19 for interference with right to hold, use and enjoy a homestead claim. Affirmed on authority of **United States v. Waddell**, *supra*.

1935—**United States v. Kantor, et al.**, 78 F. 2d 710 (C. C. A. 2).

§ 19 protects only individual voter and does not include all wrongful acts altering results of election, but only act intended to prevent citizen from exercising his constitutional rights.

1935—**Nicholson v. United States**, 79 F. 2d 387 (C. C. A. 8).

Right of citizen to inform federal officers of unlawful movement of alcohol is one secured to him by laws and Federal Constitution and person interfering with right could be prosecuted under § 19 (18 U. S. C., § 51).

Follows **Motes**, *supra*.

1937—**Walker v. United States**, 93 F. 2d 383 (C. C. A. 8).

Indictment under § 19 (18 U. S. C., § 51) charging conspiracy to injure citizens in their right to vote for presidential electors and to have their votes counted as cast charged no federal offense, since presidential electors are "state officers," and not "federal officers."

Ex parte Yarbrough, *supra*, was distinguished (p. 388). The court said: "Manifestly, the right to vote for presidential electors depends directly and exclusively on state legislation" (Ibid.).

1942—**United States v. Ellis**, 43 Fed. Supp. 321.

Right to vote in a Federal election comprehends and includes the right to register for a general election in which members of Congress are to be elected.

I have rather laboriously read, digested and presented the cases involving what is now Section 18-241 U. S. C. My main purpose in so doing was to ascertain whether I could conscientiously state to the Court that as to this phase of the case, there is no novel question involved. I can so state. The only question is whether the Court will now adhere to the principle which has been gleaned from the decisions over a period of almost a century.

“To know what the law is and to litigate anyway, using some technicality as an excuse, is more than an impropriety; it is an attack on the working of the law itself.”*

If my view of the case is correct, the Court will have no reason to be concerned with questions 2 and 3 as stated in the Jurisdictional Statement (p. 3).

Nevertheless, I discuss them.

II.

“Does Section 241 reach unofficial conspiracies against the exercise of rights secured by Title II of the Civil Rights Act of 1964, relating to places of public accommodation?”

(Jurisdictional Statement, p. 3).

It is perfectly plain that if it does, it strengthens tremendously the void for vagueness argument hereinbefore made.

* Attorney General Katzenbach at Emory University, on or about April 23, 1965. *The Macon News*, Apr. 24, 1965.

For, if it so reaches, it must be considered as if it read:

"If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States including the right to the full enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in Section 301 (a) of the Civil Rights Act of 1964, without discrimination or segregation on the ground of race, color, religion, or national origin, and the right to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, rule, or order of a State or any agency or political subdivision thereof. . . ."

A statute more vague or indefinite than that could hardly be imagined.

Additionally, if 18 U. S. C. 241 were so construed it would cause a conspiracy to commit certain acts to become a Federal crime, and, at the same time, the actual commission of the very same acts would not be a Federal crime.

"The courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws or treaties of the United States, but they resort to the common law for the definition of terms by which offenses are designated. A conspiracy is sufficiently described as a combination of two or more persons, by concerted action to accomplish a criminal or unlawful purpose, or some purpose

not in itself criminal or unlawful, by criminal or unlawful means, . . .”

Pettibone v. United States, 148 U. S. 197, 203.

I suggest that if the statute were so construed it would be void for vagueness because wilfulness or knowledge on the part of the conspirators would not be included in the statute as an ingredient of the crime, and such inclusion would be necessary, as it was in the **Screws** case, to save the statute.

“It seems clear that an indictment against a person for corruptly or by threats or force endeavoring to influence, intimidate or impede a witness or officer in a court of the United States in the discharge of his duty must charge knowledge or notice, on the part of the accused, that the witness or officer was such. And the reason is no less strong for holding that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court.”

Pettibone v. United States, 148 U. S. 197, 206.

“Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide sweeping nets of conspiracy prosecutions.”

Grunewald v. United States, 353 U. S. 391, 404;
Citing:

Delli Paoli v. United States, 352 U. S. 232;

Lutwak v. United States, 344 U. S. 604;

Krulewitch v. United States, 336 U. S. 440;

Bollenbach v. United States, 326 U. S. 607.

In his concurring opinion in the **Krulewitch** case, *supra*, Mr. Justice Jackson wrote:

"This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice."

336 U. S. at pp.446-7.

How much the more serious is the threat when the government seeks to indict for conspiracy, and to have the conspiracy statute broadened, when there is no substantive Federal offense for which this appellee could be prosecuted in a Federal Court.

For convenience, I quote what the District Judge said with respect to the applicability here of the Civil Rights Act of 1964:

"Having decided that none of these rights and privileges are federal citizenship rights and privileges, and that none of them appertain to federal citizenship as such, we need go no further. We are convinced, however, that the Civil Rights Act of 1964 in no way aids the prosecution. It seems crystal clear that the Congress in enacting the Civil Rights Act of 1964 did not intend to subject anyone to any possible criminal penalties except those specifically provided for in the Act itself. Throughout the Act are provisions for injunctive relief, including restraining orders and temporary and permanent injunctions. Section 1101, in part, reads:

“ ‘In any proceeding for criminal contempt arising under Title II, III, IV, V, VI, or VII of this Act, the accused, upon demand therefor, shall be entitled to a trial by jury, which shall conform as near as may be to the practice in criminal cases. Upon conviction, the accused shall not be fined more than \$1,000 or imprisoned for more than six months,’ and § 207 (b) says:

“ ‘The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring non-discrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.’

“ ‘The Congress could hardly have made plainer its intention not to bring into play the ninety-four year old ten year felony statute.’”

(Transcript, pp. 34-35.)

At that point, the District Judge inserted the following as a footnote:

“ ‘Senator Humphrey,* the leading spokesman for the Civil Rights Act, explained subsection 207 (b) in a speech delivered on the floor of the Senate on May 1, 1964, as follows:

“ ‘The clause which reads that “the remedies provided in this Title shall be the exclusive means of enforcing the rights thereby created” is designed to make clear that a violation of sections 201 and 202 cannot result in criminal prosecution of the violator

* Now, of course, Vice President of the United States.

or in a judgment of money damages against him. This language is necessary because otherwise it could be contended that a violation of these provisions would result in criminal liability under 18 U. S. C. 241 or 242 . . . Thus, the first clause in section (207 (b)) simply expresses the intention of Congress that the rights created by Title II may be enforced only as provided in Title II. This would mean, for example, that a proprietor in the first instance, legitimately but erroneously believes his establishment is not covered by section 201 or section 202 need not fear a jail sentence or a damage action if his judgment as to the coverage of Title II is wrong.' ”

To paraphrase what the government argues at page 33 of its brief herein: The most compelling evidence of the intent of the framers of the Civil Rights Act of 1964 is, of course, to be found in the statements made in debates by the leading spokesman for the Act, who now happens to be Vice President of the United States.

After quoting Senator Humphrey, Judge Bootle observed:

“Indeed in the recent case of *Atlanta Motel v. United States*, . . . U. S. . . . (Dec. 14, 1964), the Supreme Court, after an analysis of Title II of the Act, concludes that under it ‘remedies are limited to civil actions for preventive relief.’ ”

III.

What has been said in the preceding sections of this brief answers *a fortiori* the third question stated by the government at page 3 of its Jurisdictional Statement:

“Whether Section 241 reaches unofficial conspiracies against the right to freely enter and leave the

State and the right to freely use the instrumentalities of interstate commerce."

IV.

At page 33 of its brief the government states:

"The contemporary history of the Equal Protection Clause and the Fifth Section of the Fourteenth Amendment indicates a purpose to authorize congressional legislation reaching private conspiracies."

Its first argument in support of that thesis is: "The most compelling evidence of the intent of the framers of the Fourteenth Amendment is, of course, to be found in the reports and debates of the Thirty-Ninth Congress which drafted the Amendment and proposed it to the States. But, unfortunately, those materials contain nothing really conclusive on the point at issue here."

After several pages of discussion, which serves only to confirm the original statement that the reports and debates contain nothing really conclusive on the point at issue here, the brief states (p. 40):

"The earliest judicial decisions sustained congressional power to protect the rights which the Fourteenth and Fifteenth Amendments secure against private encroachment. Their proximity to the Amendment suggests that they accurately translate the original understanding."

At pages 41 and 42, then the government cites as supporting that argument, **United States v. Hall**, 26 Fed. Cas. 79, decided by Judge Woods, and **United States v. Mall**, 26 Fed. Cas. 1147. Both of these cases were decided in 1871. But, the government overlooked pointing out, as I have heretofore in some detail, that in **LeGrand v. United States**, 12 Fed. 577, the same Judge Woods, then (1882)

Justice Woods, after the decisions of the Supreme Court in **U. S. v. Reese**, 92 U. S. 214; **U. S. v. Cruikshank**, 92 U. S. 542; **Virginia v. Rives**, 100 U. S. 313, wrote:

"It is perfectly clear . . . that when a state has been guilty of no violation of its provisions the section does not confer on Congress the power to punish private individuals who, acting without any authority from the state, and it may be in defiance of its laws, invade those rights of the citizen which are protected by the amendment" (op. cit. p. 579).

At pages 42-43 of its brief, the government cites along with Hall and Mall, as supporting its argument, **United States v. Given**, 25 Fed. Cases, p. 1324. The government states that Given was a State official (p. 43). The rulings in the case make it clear that not merely "private encroachments" were involved. The second headnote is:

"When state laws have imposed duties upon persons, whether officers or not, the performance or non-performance of which affects rights under the federal government, Congress may make the non-performance of those duties an offense against the United States, and may punish it accordingly."

The indictment there was under section two of the act of Congress of May 31, 1870, which enacts "that if by or under the authority of the constitution or laws of any state, . . . any act is or shall be required, etc."

Despite the fact that it concedes that Given was a "State official," the government labors to make use of this decision as a "contemporary construction" because, forsooth, Justice Strong, at page 1326, uses the phrase "from any quarter."

This decision was rendered in 1873. If there is the slightest doubt as to the views of Justice Strong on this

question, we need only read his opinion in **Virginia v. Rives**, 100 U. S. 313, October Term, 1879, and particularly that portion of it at page 318:

“The provisions of the Fourteenth Amendment of the Constitution which we have quoted all have reference to State action exclusively, **and not to any action of private individuals.** It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and consequently the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment **are intended** for protection against State infringement of those rights. Section 641 (of the U. S. Revised Statutes) was also intended for their protection against State action, **and against that alone.**”

If there remains any doubt, read his opinion in **Ex Parte Virginia**, decided contemporaneously with **Virginia v. Rives**, *supra*. In **Ex parte Virginia**, 100 U. S. 339, at pages 346-347, Justice Strong wrote:

“We have said the prohibitions of the Fourteenth Amendment are addressed to the States. They are, ‘No **State** shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws.’ They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within

its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

"But the constitutional amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to **enforce** its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured."

Previously, in the same opinion, Justice Strong had written:

"They (the 13th, 14th and 15th Amendments) were intended to take away all possibility of oppression **by law** because of race or color. They were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress." (Emphasis added.)

Justice Strong (of Pennsylvania) had been appointed by President Grant as an Associate Justice February 18, 1870. From 1857 to 1868 he had been an Associate Justice of the Supreme Court of Pennsylvania. From 1868 to the time of his appointment to the court, he practiced law in Philadelphia.

Such was the Justice who wrote for the Court the sentence which for four score and five years has been an established principle of Constitutional Law:

"The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals."

Virginia v. Rives, 100 U. S. 313, 318.

For four score and five years those words have comprised an established principle of Constitutional Law by which the States and their people might regulate their affairs.

Times innumerable this case has been cited by the courts. Even in such cases as **Cooper v. Aaron**, 358 U. S. 1, 16-17; **Shelley v. Kraemer**, 334 U. S. 1; **Pennsylvania v. Board of Directors of City Trusts of Philadelphia**, 353 U. S. 230, 231, the principle it, and its companion case, and prior cases established has been recognized as controlling.

Justice Brandeis, following it, succinctly expressed its principle: "The prohibition of the Fourteenth Amendment, it is true, has reference exclusively to action by the state, as distinguished from action by private individuals."

Iowa-Des Moines National Bank v. Bennett, 284 U. S. 239, 245.

"Only if a State deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment can its protection be invoked."

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U. S. 70, 72.

In **Griffin v. Maryland**, 378 U. S. 133, 135, the Chief Justice recognizes the need for state action in order for the Fourteenth amendment to be applicable.

I cite these few cases from the many available to show how unbrokenly and recently the established principle has been applied.

Since the principle was first established and applied, the Congress has proposed to the States eleven amendments.* Never in these eighty years or more, has the Congress sought to amend the Constitution so as to give the Fourteenth Amendment the meaning the Justice Department seeks to have the Court ascribe to it.

In so seeking, its brief says of **Virginia v. Rives**, 100 U. S. 313, and **Ex parte Virginia**, 100 U. S. 339:

"The ruling of the court was not a restrictive one; it found State officers of every category amendable (sic) to the Fourteenth Amendment, without purporting to decide whether Congress might also reach private persons in certain circumstances" (Its brief, page 49).

I find it difficult to reconcile that statement with the succinct statement in **Virginia v. Rives**, supra: "The prohibitions of the Fourteenth Amendment have exclusive reference to State action" (100 U. S. 313, first sentence of headnote two; see also p. 318).

At pages 50-51 of that brief it is stated: "To be sure, it has been reiterated that 'the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.' E. g. **Shelley v. Kraemer**, 334 U. S. 1, 13. But such statements

* The sixteenth through the twenty-fourth, inclusive; the Child Labor Amendment which was proposed but not ratified; the proposed Presidential disability amendment, now pending for ratification.

may fairly be read as defining only the self-executing force of the Amendment, unaided by implementing legislation."

This argument seems to be that "implementing legislation" may go beyond the authorization of the Constitutional amendment. Such an argument overlooks the fundamental principle that to be appropriate legislation under § 5 of the Amendment it must not exceed the limitation of § 1.

The complete answer to it is found in **Virginia v. Rives**, supra, 100 U. S. 313, wherein there was being considered Section 641 of the United States Revised Statutes which was legislation implementing the Fourteenth Amendment.

"The prohibitions of the Fourteenth Amendment have exclusive reference to State action. It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and, consequently, **the statutes founded upon the amendment**, and partially enumerating what civil rights the colored man shall enjoy equally with the white are intended for protection against State infringement of those rights. Sect. 641 was also intended to protect them against State action, and against that alone.

"A State may exert her authority through different agencies, and those prohibitions extend to her action denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. The mode of enforcement is left to its discretion . . ." (headnotes 2 and 3).

And see the discussion at pages 318-319 of the opinion.

CONCLUSION.

I submit this brief to the Court on behalf of the Appellee, Lackey, because I had the honor of being appointed by the Court to represent his interests. I have attempted to perform that duty by somewhat laboriously presenting to the Court what I deem to be established and controlling principles of American Constitutional Law.

I have attempted to approach the questions involved bearing in mind the views expressed by the late Justice Frankfurter in **West Virginia State Board of Education v. Barnette**, 319 U. S. 646-647:

“One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court’s opinion, representing as they do the thought and action of a life time. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard.”

As a member of the Bar, I am bound, if I weren’t otherwise, to “support and defend the Constitution of the United States.”

As a member of the same faith as the late Justice Frankfurter, I have a personal interest, too. Over the years, I have struggled against stretching and distortions

of our Constitution. Principally I have so struggled because I conceive it to be my duty as a citizen and lawyer to defend the Constitution against assaults from whatever source. I have so struggled because it is my firm belief that if our Constitution is to be amended that process should be in accordance with Article V thereof.

I have so struggled because I sincerely believe that the only hope any American, certainly any minority, has for survival is in strict construction of and obedience to our written Constitution as construed unbrokenly over the years. If, today, those in power can stretch and distort the Constitution favorably to a minority, tomorrow, another and adverse group, risen to power, can stretch and distort it to destroy that minority.

From every standpoint, I can sincerely and respectfully submit to the Court that Judge Bootle's judgment was correct, fully supported by controlling precedents, and should be affirmed.

.....
CHARLES J. BLOCH,

Attorney for Appellee, James
Spergeon Lackey

(By Appointment of the Court).

COPY

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**In The
Supreme Court of the United States**

**UNITED STATES,
Appellee**

*** NO. 65**

vs

*** IN THE SUPREME
COURT OF THE
* UNITED STATES**

**HERBERT GUEST, et al, *
Appellants**

BRIEF

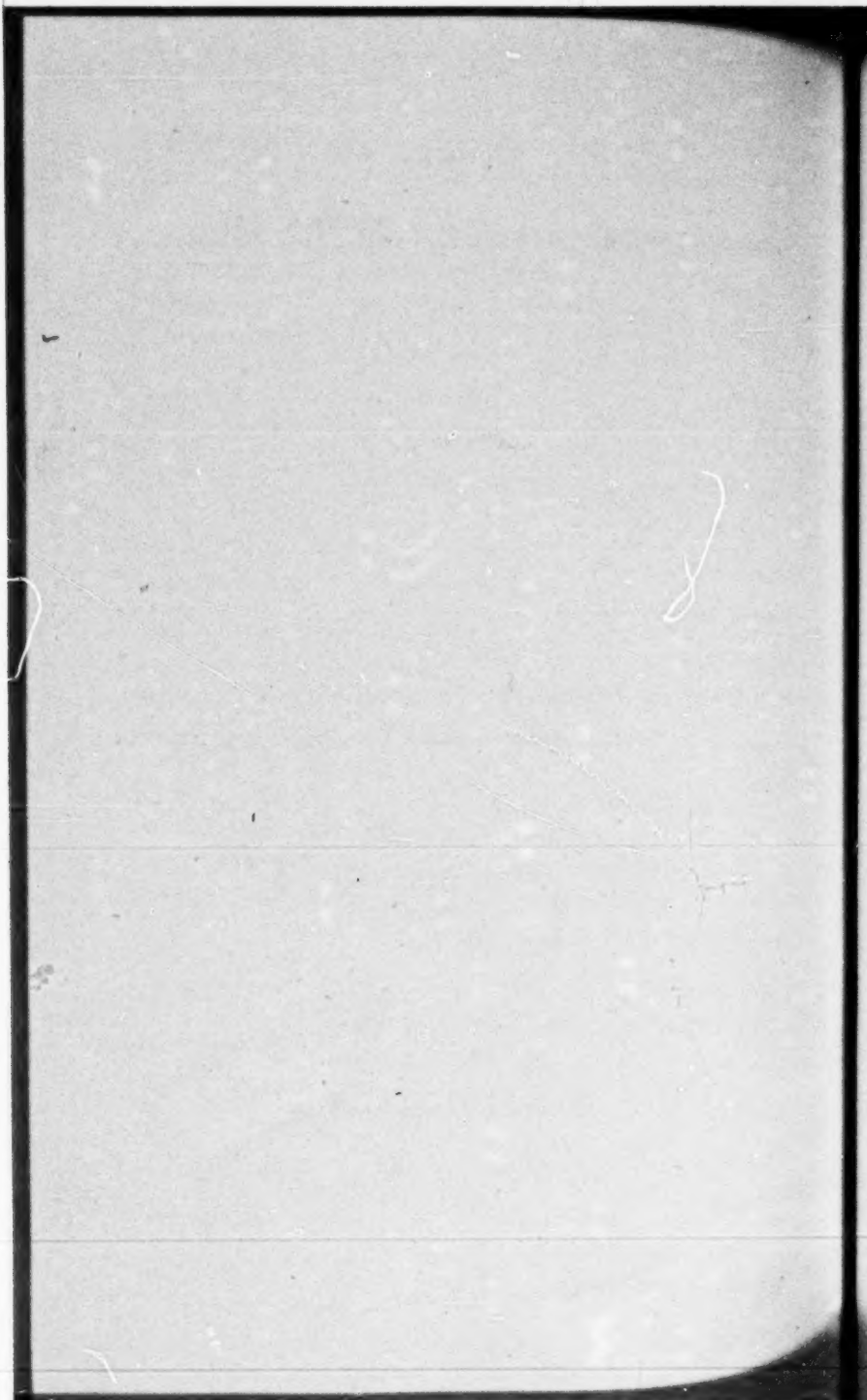
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**In the
Supreme Court of the United States**

OCTOBER TERM, 1965.

UNITED STATES,

Appellant,

vs.

HERBERT GUEST, et al.,

Appellees.

BRIEF

Of Counsel for Appellees, Herbert Guest, Cecil William Myers, Denver Willis Phillips, Joseph Howard Sims, and George Hampton Turner

INTRODUCTORY STATEMENT.

The Indictment in this case was filed in the United States District Court for the Middle District of Georgia, Athens Division, on October 16, 1964, and alleged in substance that commencing on or about

January 1, 1964, and continuing to the date of the indictment, that the named Defendants, did, within the Middle District of Georgia, Athens Division, conspire together, with each other, and with other persons to the Grand Jury unknown, to injure, oppress, threaten, and intimidate Negro citizens of the United States in the vicinity of Athens, Georgia, in the free exercise of enjoyment by said Negro citizens of certain rights and privileges alleged to be secured to them by the Constitution and Laws of the United States. The indictment then proceeded to set out what the alleged rights and privileges secured to the said Negro citizens were. It was then alleged in the indictment that all of the acts were in violation of Section 241, Title 18, United States Code.

The Defendants, with the exception of James Spurgeon Lackey, then entered a plea of not guilty in open court.

All of the Defendants subsequently filed a Motion to Dismiss the indictment on the ground that the same did not charge an offense under the Laws of the United States.

A hearing on the Motion was subsequently held and the District Judge, Judge W. A. Bootle, dismissed the indictment.

The case was then appealed to this Court by the United States under the auspices of 18 U. S. C. 3731.

QUESTIONS PRESENTED

The United States contends, and these particular Appellees, admit, that the questions presented are as follows:

1. Whether Section 18 U. S. C. 241 reaches private conspiracies against the exercise of rights secured by the Equal Protection Clause of the Fourteenth Amendment.
2. Whether Section 18 U. S. C. 241 reaches conspiracies against the exercise of the rights to travel freely to and from any State and to use the instrumentalities of Inter-State Commerce.

3. Whether Section 18 U. S. C. 241 reaches conspiracies against the exercise of rights secured by Title II of the Civil Rights Act of 1964.

These Appellees' arguments against the contentions of the United States will be set out hereinafter in chronological order.

1.

Section 18 U. S. C. 241 does not reach conspiracies against the exercise of rights secured by the Equal Protection Clause of the Fourteenth Amendment.

Prior rulings of this Court positively hold that 18 U. S. C. 241 does not reach private conspiracies against the exercise of rights secured by the Equal Protection Clause of the Fourteenth Amendment. Please see *United States v. Harris*, 106 U. S. 629, 638-640; *Civil Rights Cases*, 109 U. S. 3, 11-19; *United States v. Cruikshank*, 92 U. S. 542, 554; *Virginia v. Rives*, 100 U. S. 313, 318; and *United States v. Williams*, 341 U. S. 70.

The United States apparently admits that all of the above cited cases except the Williams case are authorities contrary to their position. At page 19 of the United States' brief it is stated that, "This is not to deny that there are statements in the decisions of this Court which apparently point the other way."

There simply are no prior controlling decisions of this Court which hold that a conspiracy of private persons to deny other persons rights and privileges secured by the Fourteenth Amendment is a violation of 18 U. S. C. 241.

The United States apparently relies upon the dissenting opinion in the Williams case for their authority to the contrary. The dissenting opinion in the Williams case is not authority for their position, but rather, it strongly upholds the decision by Judge Bootle dismissing the indictment.

The facts in the Williams case show that Williams was a special police officer of a city, had taken an oath as such officer, and a regular police officer was detailed to attend the investigation out of which the conspiracy indictment arose.

It is clear that the main difference in opinion between the majority in the Williams case and the dissent was that the majority did not consider that the individuals who perpetrated the crime were acting for a State or under color of State authority, and the dissent did construe the facts to be that the individuals indicted were acting for a State or under color of State authority.

Justice Douglas said at Page 92 of the Williams case, "There is no decision prior to that of the Court of Appeals in this case (Williams case) which is opposed to our view. Fourteenth Amendment rights have sometimes been asserted under Section 19 now 241 and denied by the Court. That was true in *U. S. v. Cruikshank*, 92 U. S. 542. But the denial had nothing to do with the issues in the present case. The Fourteenth Amendment protects the individual against STATE ACTION, not against acts done by INDIVIDUALS (the emphasis is Justice Douglas'). Civil Rights Cases, 109 U. S. 3, et cetera. The Cruikshank case, like others, involves wrongful action by INDIVIDUALS (emphasis Justice Douglas') who did not act for a State nor under color of State authority. As the Court in the Cruikshank said, 'The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which preceeds it, — add anything to the rights which one citizen has under the Constitution against another.' 92 U. S. pp. 554, 555. There is implicit in this holding, as Mr. Justice Rutledge observed in the Screws case, *Supra*, (325 U. S. 125 Note 22) that wrongful action by State officials would bring the case within Section 19 (now 241). For the Court in the Cruikshank case stated, 'The only obligation resting on the United States is to see that the

States do not deny the right. This amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty.'

Section 19 has in fact been applied to the protection of rights under the Fourteenth Amendment. See *U. S. v. Hall*, (CC, ALA,) F. CAS. Number 15712 p. 1147; *Ex Parte Riggins* (CC, ALA) 134 F. 404, Writ dismissed, 199 U. S. 547. Those attempts which failed did so not because Section 19 was construed to have too narrow a scope, but because the action complained of was INDIVIDUAL action, not STATE action." (Emphasis Justice Douglas').

At page 8 of the Brief of the United States the statement is made that, "In light of the *Williams* case, the threshold question with respect to this branch of the case is whether Section 241 protects Fourteenth Amendment rights at all."

We think that under prior decisions, there is authority for the proposition that Section 241 protects Fourteenth Amendment rights, but to paraphrase Justice Douglas in the *Williams* case, it protects from wrongful action by individuals who act for a State or either under color of State authority. The indictment in the case at bar does not even remotely suggest that these Appellees in the course of their conspiracy were acting for a State or either under State authority.

The United States in its Brief at Page 51 seems to admit that the *Williams* case forecloses prosecutions of this character under 18 U. S. C. 241, since they state that, "After *HARRIS*, the criminal sanctions of the *Ku Klux Klan Act of 1871* were no longer available and the ruling in *United States v. Williams*, 341 U. S. 70, seemed to foreclose prosecutions of this character under Section 241 of the Criminal Code."

The *Williams* case and all the preceding authorities thus hold that 18 U. S. C. 241 does not reach private conspiracies as alleged in this indictment.

Since the Williams case Congress has not seen fit to implement legislation to enforce the guarantee of the Equal Protection Clause against private conspiracies as alleged in the indictment in the case at bar. The United States contends that the Civil Rights Act of 1964 was such a legislative implementation, but we shall argue that point in its proper place.

18 U. S. C. 241, under the quoted authorities, simply does not lend itself to the indictment as laid.

2.

The next question is whether or not Section 18 U. S. C. 241 reaches conspiracies against the exercise of the rights to travel freely to and from any State and to use the instrumentalities of Interstate Commerce. As applied to the facts of the case at bar this question must be answered in the negative.

The case of *United States v. Harry C. Wheeler*, 254 U. S. 281, Headnote 4, holds that, "The United States is without power to forbid and punish infractions by individuals of the right of citizens to reside peacefully in the several States, and to have free ingress into and egress from such States.

Authority to deal with such wrongs is exclusively within the power reserved by the Federal Constitution to the State." (Fourth Amendment to the United States Constitution, Section 2).

The Court further stated, "There are two classes of rights enjoyed by citizens of the United States as such: (a) Rights by which one is entitled to protection merely against action by or on behalf of the States, where the action is in conflict with the provisions of the Federal Constitution and (b) rights which one is entitled to protection against the action of individuals."

At page 292 of said case the Court states that, "The provisions of the Fourteenth Amendment are also concerned with action by the States, and do not confer a Federal right to protection against the action of individuals, in the absence of action by the State."

Here again, assuming, but not admitting, it might be that such a conspiracy entered into by persons or with persons acting for a State authority, might be a crime against the United States under 18 U. S. C. 241. However, as previously pointed out, the indictment in the case at bar does not remotely connect these Appellees with any person acting for a State or under State authority.

We cannot more aptly put it than did Judge Bootle in his opinion below which is found at page 33 of the printed Transcript of the Record, where he states, "We think it clear also that the right asserted in Paragraph 4 to travel freely to and from the State of Georgia, and to use highway facilities and other instrumentalities of the State and Interstate Commerce within the State of Georgia is not an attribute of National citizenship. See *Wheeler v. United States*, supra. Travel rights including free ingress to a State and egress there from are rights inherent in citizens of all free Governments including citizens of all the States and the States have full authority to punish violations of this fundamental right. *United States v. Wheeler*, supra, at 293. These rights were not created, or granted, by the Federal Constitution. Article IV of the Articles of Confederation recognized these rights as belonging to the "Free Citizens in the Several States" and stipulated that "the people of each State shall have free ingress and egress to and from any other State." Article IV, Sec. 2 of the Constitution plainly intended to preserve and enforce the limitation as to discrimination imposed upon the States by Article IV of the Articles of Confederation, and thus necessarily assumed the continued possession by the States of the reserved power to deal with free residents, ingress and egress." *United States v. Wheeler*, supra, at 294. Thus, these ordinary and usual travel rights are not Federal citizenship rights and do not become such by virtue of the exercise of the Congressional Power to regulate Interstate Commerce under Article I, sec. 8, of the Constitution. Regulation is not tantamount to creation, and if it were the

creation would be for inhabitants and citizens of States generally and not exclusively for citizens of the United States."

We respectfully submit that 18 U. S. C. 241, especially under the allegations of this case where there is no connection at all with a person acting for a State or under authority of a State, does not reach conspiracies against the exercise of the rights to travel freely to and from any State and to use the instrumentalities of the Interstate Commerce.

3.

The United States contends that 18 U. S. C. 241 reaches conspiracies against the exercise of rights secured by Title II of the Civil Rights Act of 1964.

Section 207 (b) of the Civil Rights Act of 1964 provides that, "The remedies provided in this Title shall be the exclusive means of enforcing the rights based on this Title, but nothing in this Title shall preclude any individual or any State or local agency from ascertaining any right based on any other Federal or State law not inconsistent with this Title, including any Statute or Ordinance requiring non-discrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right."

Senator (now Vice-President) Humphrey, in explaining Section 207 (b) in a speech on the Senate floor on May 1, 1964, stated that, "The clause which reads that, 'the remedies provided in this Title shall be the exclusive means of enforcing the rights thereby created' is designed to make clear that a violation of Section 201 and 202 cannot result in criminal prosecution of the violator or in a judgment of money damages against him. This language is necessary because otherwise it could be contended that a violation of these provisions would result in criminal liability under 18 U. S. C. 241

or 242. Thus, the first clause in Section 207 (b) simply expresses the intention of Congress that the rights created by Title II may be enforced only as provided in Title II. This would mean, for example, that a proprietor in the first instance, legitimately but erroneously believes his establishment is not covered by Section 201 or Section 202 need not fear a jail sentence or a damage action if his judgment as to the coverage of Title II is wrong."

This is positive evidence that in passing the Civil Rights Act of 1964 it was not intended that a violation of said Act could ever result in prosecution under 18 U. S. C. 241.

The word "exclusive" is susceptible of no other meaning.

As is pointed out in *United States v. Williams*, 340 U. S. 70, at page 79, Congress has revised the Act which now contains 18 U. S. C. 241 a total of five times. In the last three revisions of the Act, the Congress had before it a consistent course of decisions of the Supreme Court which indicated that what is now Section 241 was in practice interpreted only to protect rights arising from the existence and powers of the Federal Government. Further, in passing the 1964 Civil Rights Act, Congress had before it the decision in the *Williams* case, *supra*, wherein it is held even by the dissent, "The Fourteenth Amendment protects the individual against STATE ACTION, not against acts done by INDIVIDUALS. (emphasis is Justice Douglas') *United States v. Williams*, 341 U. S. 70 at page 92.

It manifestly was never intended by Congress that a violation of the Civil Rights Act of 1964 could ever result in punishment under 18 U. S. C. 241.

CONCLUSION

For this Court to overrule the decision of Judge Bootle is to sow the evil seeds of an all encompassing Federal Police Force which would not be in accordance with the intentions of the framers of our great Constitution and which would not be to the best interests of the citizens and inhabitants of the United States of America.

We earnestly submit that 18 U. S. C. 241 does not reach such a private conspiracy, as is alleged in the indictment, against the exercise of rights secured by the Equal Protection Clause of the Fourteenth Amendment, that it does not reach such a conspiracy, as is alleged in this indictment, against the exercise of the rights to travel freely to and from any State and to use the instrumentalities of Inter-State Commerce, that it does not reach such a conspiracy as alleged in this indictment against the rights secured by Title II of the Civil Rights Act of 1964, and that the judgment of the trial court dismissing the indictment should be affirmed.

HUDSON AND STULA

BY:

Attorney for Appellees,
Herbert Guest, Cecil
Williams Myers, Denver
Willis Phillips,
Joseph Howard Sims,
and George Hampton Turner.

SUPREME COURT OF THE UNITED STATES

No. 65.—OCTOBER TERM, 1965.

United States, Appellant,	} On Appeal From the United	
v.		States District Court for
Herbert Guest et al.		the Middle District of Georgia.

[March 28, 1966.]

MR. JUSTICE STEWART delivered the opinion of the Court.

The six defendants in this case were indicted by a United States grand jury in the Middle District of Georgia for criminal conspiracy in violation of 18 U. S. C. § 241. That section provides in relevant part:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;

"They shall be fined not more than \$5000 or imprisoned not more than ten years, or both."

In five numbered paragraphs, the indictment alleged a single conspiracy by the defendants to deprive Negro citizens of the free exercise and enjoyment of several specified rights secured by the Constitution and laws of the United States.¹ The defendants moved to dismiss

¹ The indictment, filed on October 16, 1964, was as follows:

"THE GRAND JURY CHARGES:

"Commencing on or about January 1, 1964, and continuing to the date of this indictment, HERBERT GUEST, JAMES SPERGEON LACKEY, CECIL WILLIAM MYERS, DENVER WILLIS PHILLIPS, JOSEPH HOWARD SIMS, and GEORGE HAMPTON TURNER, did, within the Middle District of Georgia, Athens Division, conspire together, with each other, and with other persons

the indictment on the ground that it did not charge an offense under the laws of the United States. The District Court sustained the motion and dismissed the

to the Grand Jury unknown, to injure, oppress, threaten, and intimidate Negro citizens of the United States in the vicinity of Athens, Georgia, in the free exercise and enjoyment by said Negro citizens of the following rights and privileges secured to them by the Constitution and the laws of the United States:

"1. The right to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of motion picture theaters, restaurants, and other places of public accommodation;

"2. The right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof;

"3. The right to the full and equal use on the same terms as white citizens of the public streets and highways in the vicinity of Athens, Georgia;

"4. The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia;

"5. Other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia.

"It was a part of the plan and purpose of the conspiracy that its objects be achieved by various means, including the following:

"1. By shooting Negroes;

"2. By beating Negroes;

"3. By killing Negroes;

"4. By damaging and destroying property of Negroes;

"5. By pursuing Negroes in automobiles and threatening them with guns;

"6. By making telephone calls to Negroes to threaten their lives, property, and persons, and by making such threats in person;

"7. By going in disguise on the highway and on the premises of other persons;

"8. By causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts; and

"9. By burning crosses at night in public view.

"All in violation of Section 241, Title 18, United States Code."

The only additional indication in the record concerning the factual details of the conduct with which the defendants were charged is

indictment as to all defendants and all numbered paragraphs of the indictment. 246 F. Supp. 475.

The United States appealed directly to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731.² We postponed decision of the question of our jurisdiction to the hearing on the merits. 381 U. S. 932. It is now apparent that this Court does not have jurisdiction to decide one of the issues sought to be raised on this direct appeal. As to the other issues, however, our appellate jurisdiction is clear, and for the reasons that follow, we reverse the judgment of the District Court. As in *United States v. Price*, — U. S. —, decided today, we deal here with issues of statutory construction, not with issues of constitutional power.

I.

The first numbered paragraph of the indictment, reflecting a portion of the language of § 201 (a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a (a) (1964 ed.), alleged that the petitioners conspired to injure, oppress, threaten, and intimidate Negro citizens in the free exercise and enjoyment of:

"The right to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of motion picture theaters, restaurants, and other places of public accommodation."³

the statement of the District Court that: "It is common knowledge that two of the defendants, Sims and Myers, have already been prosecuted in the Superior Court of Madison County, Georgia for the murder of Lemuel A. Penn and by a jury found not guilty." 246 F. Supp. 475, 487.

²This appeal concerns only the first four numbered paragraphs of the indictment. The Government conceded in the District Court that the fifth paragraph added nothing to the indictment, and no question is raised here as to the dismissal of that paragraph.

³Section 201 (a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a (a) (1964 ed.), provides:

"All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommo-

The District Court held that this paragraph of the indictment failed to state an offense against rights secured by the Constitution or laws of the United States. The court found a fatal flaw in the failure of the paragraph to include an allegation that the acts of the defendants were motivated by racial discrimination, an allegation the court thought essential to charge an interference with rights secured by Title II of the Civil Rights Act of 1964.⁴ The court went on to say that, in any event, 18 U. S. C. § 241 is not an available sanction to protect rights secured by that title because § 207 (b)

datations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

The criteria for coverage of motion picture theaters by the Act are stated in §§ 201 (b)(3) and 201 (c)(3), 42 U. S. C. §§ 2000a (b)(3) and 2000a (c)(3) (1964 ed.); the criteria for coverage of restaurants are stated in §§ 201 (b)(2) and 201 (c)(2), 42 U. S. C. §§ 2000a (b)(2) and 2000a (c)(2) (1964 ed.). No issue is raised here as to the failure of the indictment to allege specifically that the Act is applicable to the places of public accommodation described in this paragraph of the indictment.

⁴ The District Court said: "The Government contends that the rights enumerated in paragraph 1 stem from Title 2 of the Civil Rights Act of 1964, and thus automatically come within the purview of § 241. The Government conceded on oral argument that paragraph one would add nothing to the indictment absent the Act. It is not clear how the rights mentioned in paragraph one can be said to come from the Act because § 201 (a), upon which the draftsman doubtless relied, lists the essential element 'without discrimination or segregation on the ground of race, color, religion, or national origin.' This element is omitted from paragraph one of the indictment, and does not appear in the charging part of the indictment. The Supreme Court said in *Cruikshank*, *supra*, 92 U. S. at page 556, where deprivation of right to vote was involved,

"We may suspect that 'race' was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offense and cannot be supplied by implication. Everything essential must be charged positively, not inferentially. The defect here is not in form, but in substance." 246 F. Supp. 475, 484.

of the 1964 Act, 42 U. S. C. § 2000a-6 (b) (1964 ed.), specifies that the remedies provided in Title II itself are to be the exclusive means of enforcing the rights the title secures.⁵

A direct appeal to this Court is available to the United States under the Criminal Appeals Act, 18 U. S. C. § 3731, from "a decision or judgment . . . dismissing any indictment . . . or any count thereof, where such decision or judgment is based upon the . . . construction of the statute upon which the indictment . . . is founded." In the present case, however, the District Court's judgment as to the first paragraph of the indictment was based, at least alternatively, upon its determination that this paragraph was defective as a matter of pleading. Settled principles of review under the Criminal Appeals Act therefore preclude our review of the District Court's judgment on this branch of the indictment. In *United States v. Borden Co.*, 308 U. S. 188, Chief Justice Hughes, speaking for a unanimous Court, set out these principles with characteristic clarity:

"The established principles governing our review are these: (1) Appeal does not lie from a judgment which rests on the mere deficiencies of the indict-

⁵ Section 207 (b) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a-6 (b) (1964 ed.), states:

"The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right."

Relying on this provision and its legislative history, the District Court said: "It seems crystal clear that the Congress in enacting the Civil Rights Act of 1964 did not intend to subject anyone to any possible criminal penalties except those specifically provided for in the Act itself." 246 F. Supp., at 485.

ment as a pleading, as distinguished from a construction of the statute which underlies the indictment. (2) Nor will an appeal lie in a case where the District Court has considered the construction of the statute but has also rested its decision upon the independent ground of a defect in pleading which is not subject to our examination. In that case we cannot disturb the judgment and the question of construction becomes abstract. (3) This Court must accept the construction given to the indictment by the District Court as that is a matter we are not authorized to review. . . ." 308 U. S., at 193.

See also *United States v. Swift & Co.*, 318 U. S. 442, 444.

The result is not changed by the circumstance that we have jurisdiction over this appeal as to the other paragraphs of the indictment. *United States v. Borden*, *supra*, involved an indictment comparable to the present one for the purposes of jurisdiction under the Criminal Appeals Act. In *Borden*, the District Court had held all four counts of the indictment invalid as a matter of construction of the Sherman Act, but had also held the third count defective as a matter of pleading. The Court accepted jurisdiction on direct appeal as to the first, second, and fourth counts of the indictment, but it dismissed the appeal as to the third count for want of jurisdiction. "The Government's appeal does not open the whole case." 308 U. S. 188, 193.

It is hardly necessary to add that our ruling as to the Court's lack of jurisdiction now to review this aspect of the case implies no opinion whatsoever as to the correctness either of the District Court's appraisal of this paragraph of the indictment as a matter of pleading or of the court's view of the preclusive effect of § 207 (b) of the Civil Rights Act of 1964.

II.

The second numbered paragraph of the indictment alleged that the defendants conspired to injure, oppress, threaten, and intimidate Negro citizens of the United States in the free exercise and enjoyment of:

"The right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated, or managed by or on behalf of the State of Georgia or any subdivision thereof."

Correctly characterizing this paragraph as embracing rights protected by the Equal Protection Clause of the Fourteenth Amendment, the District Court held as a matter of statutory construction that 18 U. S. C. § 241 does not encompass any Fourteenth Amendment rights, and further held as a matter of constitutional law that "any broader construction of § 241 . . . would render it void for indefiniteness." 246 F. Supp., at 486. In so holding, the District Court was in error, as our opinion in *United States v. Price*, — U. S. —, decided today, makes abundantly clear.

To be sure, *Price* involves rights under the Due Process Clause, whereas the present case involves rights under the Equal Protection Clause. But no possible reason suggests itself for concluding that § 241—if it protects Fourteenth Amendment rights—protects rights secured by the one Clause but not those secured by the other. We have made clear in *Price* that when § 241 speaks of "any right or privilege secured . . . by the Constitution or laws of the United States," it means precisely that.

Moreover, inclusion of Fourteenth Amendment rights within the compass of 18 U. S. C. § 241 does not render the statute unconstitutionally vague. Since the gravamen of the offense is conspiracy, the requirement that the offender must act with a specific intent to inter-

fere with the federal rights in question is satisfied. *Screws v. United States*, 325 U. S. 91; *Williams v. United States*, 341 U. S. 70, 93-95 (dissenting opinion). And the rights under the Equal Protection Clause described by this paragraph of the indictment have been so firmly and precisely established by a consistent line of decisions in this Court,⁶ that the lack of specification of these rights in the language of § 241 itself can raise no serious constitutional question on the ground of vagueness or indefiniteness.

Unlike the indictment in *Price*, however, the indictment in the present case names no person alleged to have acted in any way under the color of state law. The argument is therefore made that, since there exist no Equal Protection Clause rights against wholly private action, the judgment of the District Court on this branch of the case must be affirmed. On its face, the argument is unexceptionable. The Equal Protection Clause speaks to the State or to those acting under the color of its authority.⁷

In this connection, we emphasize that § 241 by its clear language incorporates no more than the Equal Protection Clause itself; the statute does not purport to give substantive, as opposed to remedial, implementation to any rights secured by that Clause.⁸ Since we therefore

⁶ See, e. g., *Brown v. Board of Education*, 347 U. S. 483 (schools); *New Orleans City Park Improvement Assn. v. Detiege*, 358 U. S. 54, *Wright v. Georgia*, 373 U. S. 284, *Watson v. Memphis*, 373 U. S. 526, *City of New Orleans v. Barthe*, 376 U. S. 189 (parks and playgrounds); *Holmes v. City of Atlanta*, 350 U. S. 879 (golf course); *Mayor and City Council of Baltimore City v. Dawson*, 350 U. S. 877 (beach); *Muir v. Louisville Park Theatrical Assn.*, 347 U. S. 971 (auditorium); *Johnson v. Virginia*, 373 U. S. 61 (courthouse); *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (parking garage); *Turner v. City of Memphis*, 369 U. S. 350 (airport).

⁷ "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

⁸ See p. 1, *supra*.

deal here only with the bare terms of the Equal Protection Clause itself, nothing said in this opinion goes to the question of what kinds of other and broader legislation Congress might constitutionally enact under § 5 of the Fourteenth Amendment to implement that Clause or any other provision of the Amendment.*

It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority. The Equal Protection Clause "does not . . . add any thing to the rights which one citizen has under the Constitution against another." *United States v. Cruikshank*, 92 U. S. 542, 554-555. As MR. JUSTICE DOUGLAS more recently put it, "The Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals*." *United States v. Williams*, 341 U. S. 70, 92 (dissenting opinion). This has been the view of the Court from the beginning. *United States v. Cruikshank*, *supra*; *United States v. Harris*, 106 U. S. 629; *Civil Rights Cases*, 109 U. S. 3; *Hodges v. United States*, 203 U. S. 1; *United States v. Powell*, 212 U. S. 564. It remains the Court's view today. See, *e. g.*, *Evans v. Newton*, — U. S. —; *United States v. Price*, — U. S. —.

This is not to say, however, that the involvement of the State need be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation. See, *e. g.*, *Shelley v. Kraemer*, 334 U. S. 1; *Pennsylvania v. Board*

* Thus, contrary to the suggestion in MR. JUSTICE BRENNAN's separate opinion, nothing said in this opinion has the slightest bearing on the validity or construction of Title III or Title IV of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000b, 2000c (1964 ed.).

of *Trusts*, 353 U. S. 230; *Burton v. Wilmington Parking Authority*, 365 U. S. 715; *Peterson v. City of Greenville*, 373 U. S. 244; *Lombard v. Louisiana*, 373 U. S. 287; *Griffin v. Maryland*, 378 U. S. 130; *Robinson v. Florida*, 378 U. S. 153; *Evans v. Newton*, *supra*.

This case, however, requires no determination of the threshold level that state action must attain in order to create rights under the Equal Protection Clause. This is so because, contrary to the argument of the litigants, the indictment in fact contains an express allegation of state involvement sufficient at least to require the denial of a motion to dismiss. One of the means of accomplishing the object of the conspiracy, according to the indictment, was "By causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts."¹⁰ In *Bell v. Maryland*, 378 U. S. 226, three members of the Court expressed the view that a private businessman's invocation of state police and judicial action to carry out his own policy of racial discrimination was sufficient to create Equal Protection Clause rights in those against whom the racial discrimination was directed.¹¹ Three other members of the Court strongly disagreed with that view,¹² and three expressed no opinion on the question. The allegation of the extent of official involvement in the present case is not clear. It may charge no more than co-operative private and state action similar to that involved in *Bell*, but it may go considerably further. For example, the allegation is broad enough to cover a charge of active connivance by agents of the State in the making of the "false reports," or other conduct amounting to official discrimination clearly sufficient to constitute denial of rights protected by the Equal Protection

¹⁰ See note 1, *supra*.

¹¹ 378 U. S. 226, at 242 (separate opinion of Mr. Justice Douglas); *id.*, at 286 (separate opinion of Mr. Justice Goldberg).

¹² *Id.*, at 318 (dissenting opinion of Mr. Justice Black).

Clause. Although it is possible that a bill of particulars, or the proofs if the case goes to trial, would disclose no co-operative action of that kind by officials of the State, the allegation is enough to prevent dismissal of this branch of the indictment.

III.

The fourth numbered paragraph of the indictment alleged that the defendants conspired to injure, oppress, threaten, and intimidate Negro citizens of the United States in the free exercise and enjoyment of:

"The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia."¹²

The District Court was in error in dismissing the indictment as to this paragraph. The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. In *Crandall v. Nevada*, 6 Wall. 35, invalidating a Nevada tax on every person leaving the State by common carrier, the Court took as its guide the state-

¹² The third numbered paragraph alleged that the defendants conspired to injure, oppress, threaten, and intimidate Negro citizens of the United States in the free exercise and enjoyment of:

"The right to the full and equal use on the same terms as white citizens of the public streets and highways in the vicinity of Athens, Georgia."

Insofar as the third paragraph refers to the use of local public facilities, it is covered by the discussion of the second numbered paragraph of the indictment in Part II of this opinion. Insofar as the third paragraph refers to the use of streets or highways in interstate commerce, it is covered by the present discussion of the fourth numbered paragraph of the indictment.

ment of Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 492:

"For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." See 6 Wall., at 48-49.

Although the Articles of Confederation provided that "the people of each State shall have free ingress and regress to and from any other State,"¹⁴ that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.¹⁵ In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution. See *Williams v. Fears*, 179 U. S. 270, 274; *Twining v. New Jersey*, 211 U. S. 78, 97; *Edwards v. California*, 314 U. S. 160, 177 (concurring opinion), 181 (concurring opinion); *New York v. O'Neill*, 359 U. S. 1, 6-8; 12-16 (dissenting opinion).

In *Edwards v. California*, 314 U. S. 160, invalidating a California law which impeded the free interstate passage of the indigent, the Court based its reaffirmation of the federal right of interstate travel upon the Commerce Clause. This ground of decision was consistent with precedents firmly establishing that the federal commerce power surely encompasses the movement in interstate commerce of persons as well as commodities. *Glou-*

¹⁴ Art. IV, Articles of Confederation.

¹⁵ See Chafee, Three Human Rights in the Constitution 185 (1956).

cester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203; *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, 218-219; *Hoke v. United States*, 227 U. S. 308, 320; *United States v. Hill*, 248 U. S. 420, 423. It is also well settled in our decisions that the federal commerce power authorizes Congress to legislate for the protection of individuals from violations of civil rights that impinge on their free movement in interstate commerce. *Mitchell v. United States*, 313 U. S. 80; *Henderson v. United States*, 339 U. S. 816; *Boynton v. Virginia*, 364 U. S. 454; *Atlanta Motel v. United States*, 379 U. S. 241; *Katzenbach v. McClung*, 379 U. S. 294.

Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further.¹⁶ All have agreed that the right exists. Its explicit recognition as one of the federal rights protected by what is now 18 U. S. C. § 241 goes back at least as far as 1904. *United States v. Moore*, 129 F. 630, 633. We reaffirm it now.¹⁷

¹⁶ The District Court relied heavily on *United States v. Wheeler*, 254 U. S. 281, in dismissing this branch of the indictment. That case involved an alleged conspiracy to compel residents of Arizona to move out of that State. The right of interstate travel was, therefore, not directly involved. Whatever continuing validity *Wheeler* may have as restricted to its own facts, the dicta in the *Wheeler* opinion relied on by the District Court in the present case have been discredited in subsequent decisions. Cf. *Edwards v. California*, 314 U. S. 160, 177, 180 (DOUGLAS, J., concurring); *Williams v. United States*, 341 U. S. 70, 80.

¹⁷ As emphasized in MR. JUSTICE HARLAN's separate opinion, § 241 protects only against rights secured by other federal laws or by the Constitution itself. The right to interstate travel is a right that the Constitution itself guarantees, as the cases cited in the text make clear. Although these cases in fact involved governmental interference with the right of free interstate travel, their reasoning fully

This does not mean, of course, that every criminal conspiracy affecting an individual's right of free interstate passage is within the sanction of 18 U. S. C. § 241. A specific intent to interfere with the federal right must be proved, and at a trial the defendants are entitled to a jury instruction phrased in those terms. *Screws v. United States*, 325 U. S. 91, 106-107. Thus, for example, a conspiracy to rob an interstate traveler would not, of itself, violate § 241. But if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought. Accordingly, it was error to grant the motion to dismiss on this branch of the indictment.

For these reasons, the judgment of the District Court is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

supports the conclusion that the constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private. In this connection, it is important to reiterate that the right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment.

We are not concerned here with the extent to which interstate travel may be regulated or controlled by the exercise of a State's police power acting within the confines of the Fourteenth Amendment. See *Edwards v. California*, 314 U. S. 160, 184 (concurring opinion); *New York v. O'Neill*, 359 U. S. 1, 6-8. Nor is there any issue here as to the permissible extent of federal interference with the right within the confines of the Due Process Clause of the Fifth Amendment. Cf. *Zemel v. Rusk*, 381 U. S. 1; *Aptheker v. Secretary of State*, 378 U. S. 500; *Kent v. Dulles*, 357 U. S. 116.

SUPREME COURT OF THE UNITED STATES

No. 65.—OCTOBER TERM, 1965.

United States, Appellant,	}	On Appeal From the United States District Court for the Middle District of Georgia.
v.		
Herbert Guest et al.		

[March 28, 1966.]

MR. JUSTICE CLARK, with whom MR. JUSTICE BLACK and MR. JUSTICE FORTAS join, concurring.

I join the opinion of the Court in this case but believe it worthwhile to comment on its Part II in which the Court discusses that portion of the indictment charging the appellees with conspiring to injure, oppress, threaten and intimidate Negro citizens of the United States in the free exercise and enjoyment of:

"The right to equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated, or managed by or on behalf of the State of Georgia or any subdivision thereof."

The appellees contend that the indictment is invalid since 18 U. S. C. § 241, under which it was returned, protects only against interference with the exercise of the right to equal utilization of State facilities, which is not a right "secured" by the Fourteenth Amendment in the absence of state action. With respect to this contention the Court upholds the indictment on the ground that it alleges the conspiracy was accomplished, in part, "by causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts." The Court reasons that this allegation of the indictment might well cover active connivance by agents of the State in the making of these false reports or in carrying

on other conduct amounting to official discrimination. By so construing the indictment, it finds the language sufficient to cover a denial of rights protected by the Equal Protection Clause. The Court thus removes from the case any necessity for a "determination of the threshold level that State action must attain in order to create rights under the Equal Protection Clause." A study of the language in the indictment clearly shows that the Court's construction is not a capricious one, and I therefore agree with that construction, as well as the conclusion that follows.

The Court carves out of its opinion the question of the power of Congress, under § 5 of the Fourteenth Amendment, to enact legislation implementing the Equal Protection Clause or any other provision of the Fourteenth Amendment. The Court's interpretation of the indictment clearly avoids the question whether Congress, by appropriate legislation, has the power to punish private conspiracies that interfere with Fourteenth Amendment rights, such as the right to utilize public facilities. My Brother BRENNAN, however, says that the Court's disposition constitutes an acceptance of appellees' aforesaid contention as to § 241. Some of his language further suggests that the Court indicates *sub silentio* that Congress does not have the power to outlaw such conspiracies. Although the Court specifically rejects any such connotation, *ante*, p. —, it is, I believe, both appropriate and necessary under the circumstances here to say that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.

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[March 28, 1966.]

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

I join Parts I and II¹ of the Court's opinion, but I cannot subscribe to Part III in its full sweep. To the extent that it is there held that 18 U. S. C. § 241 (1964 ed.) reaches conspiracies, embracing only the action of private persons, to obstruct or otherwise interfere with the right of citizens freely to engage in interstate travel, I am constrained to dissent. On the other hand, I agree that § 241 does embrace state interference with such interstate travel, and I therefore consider that this aspect of the indictment is sustainable on the reasoning of Part II of the Court's opinion.

This right to travel must be found in the Constitution itself. This is so because § 241 covers only conspiracies to interfere with any citizen in the "free exercise or enjoyment" of a right or privilege "secured to him by the Constitution or laws of the United States," and no "right to travel" can be found in § 241 or in any other law of the United States. My disagreement with this phase of the Court's opinion lies in this: While past cases do indeed establish that there is a constitutional "right to travel" between States free from unreasonable govern-

¹ The action of three of the Justices who join the Court's opinion in nonetheless cursorily pronouncing themselves on the far-reaching constitutional questions deliberately not reached in Part II seems to me, to say the very least, extraordinary.

mental interference, today's decision is the first to hold that such movement is also protected against *private* interference, and, depending on the constitutional source of the right, I think it either unwise or impermissible so to read the Constitution.

Preliminarily, nothing in the Constitution expressly secures the right to travel. In contrast the Articles of Confederation provided in Art. IV:

"The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively"

This right to "free ingress and regress" was eliminated from the draft of the Constitution without discussion even though the main objective of the Convention was to create a stronger union. It has been assumed that the clause was dropped because it was so obviously an essential part of our federal structure that it was necessarily subsumed under more general clauses of the Constitution. See *United States v. Wheeler*, 254 U. S. 281, 294. I propose to examine the several asserted constitutional bases for the right to travel, and the scope of its protection in relation to each source.

I.

Because of the close proximity of the right of ingress and regress to the Privileges and Immunities Clause of the Articles of Confederation it has long been declared that the right is a privilege and immunity of national citizenship under the Constitution. In the influential

opinion of Mr. Justice Washington on circuit, *Corfield v. Coryell*, 4 Wash. C. C. 371 (1825), the court addressed itself to the question—"what are the privileges and immunities of citizens in the several states?" *Id.*, at 380. *Corfield* was concerned with a New Jersey statute restricting to state citizens the right to rake for oysters, a statute which the court upheld. In analyzing the Privileges and Immunities Clause of the Constitution, Art. IV, § 2, the court stated that it confined "these expressions to those privileges and immunities which are, in their nature, *fundamental*," and listed among them "The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise" *Id.*, at 380-381.

The dictum in *Corfield* was cited with approval in the first opinion of this Court to deal directly with the right of free movement, *Crandall v. Nevada*, 6 Wall. 35, which struck down a Nevada statute taxing persons leaving the State. It is first noteworthy that in his concurring opinion Mr. Justice Clifford asserted that he would hold the statute void exclusively on commerce grounds for he was clear "that the State legislature cannot impose any such burden upon commerce among the several States." 6 Wall., at 49. The majority opinion of Mr. Justice Miller, however, eschewed reliance on the Commerce Clause and the Import-Export Clause and looked rather to the nature of the federal union:

"The people of these United States constitute one nation. . . . This government has necessarily a capital established by law That government has a right to call to this point any or all of its citizens to aid in its service The government, also, has its offices of secondary importance in all other parts of the country. On the sea-coasts and on the rivers it has its ports of entry. In the inte-

rior it has its land offices, its revenue offices, and its sub-treasuries. In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established." 6 Wall., at 43-44.

Accompanying this need of the Federal Government, the Court found a correlative right of the citizen to move unimpeded throughout the land:

"He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it." 6 Wall., at 44.

The focus of that opinion, very clearly, was thus on impediments by the States on free movement by citizens. This is emphasized subsequently when Mr. Justice Miller asserts that this approach is "neither novel nor unsupported by authority," because it is, fundamentally, a question of the exercise of a State's taxing power to obstruct the functions of the Federal Government: "[T]he right of the States in this mode to impede or embarrass the constitutional operations of that government, or the rights which its citizens hold under it, has been uniformly denied." 6 Wall., at 44-45.

Later cases, alluding to privileges and immunities, have in dicta included the right to free movement. See *Paul v. Virginia*, 8 Wall. 168, 180; *Williams v. Fears*, 179 U. S. 270, 274; *Twining v. New Jersey*, 211 U. S. 78.

Although the right to travel thus has respectable precedent to support its status as a privilege and immunity of national citizenship, it is important to note that those cases all dealt with the right of travel simply as affected by oppressive state action. Only one prior case in this Court, *United States v. Wheeler*, 254 U. S. 281, was argued precisely in terms of a right to free movement as against interference by private individuals. There the Government alleged a conspiracy under the predecessor of § 241 against the perpetrators of the notorious Bisbee Deportations.² The case was argued straightforwardly in terms of whether the right to free ingress and egress, admitted by both parties to be a right of national citizenship, was constitutionally guaranteed against private conspiracies. The Brief for the Defendants in Error, whose counsel was Charles Evans Hughes, later Chief Justice of the United States, gives as one of its main points: "So far as there is a right pertaining to Federal citizenship to have free ingress or egress with respect to the several States, the right is essentially one of protection against the action of the States themselves and of those acting under their authority." Brief, at p. i. The Court, with one dissent, accepted this interpretation of the right of unrestricted interstate movement, observing that *Crandall v. Nevada*, *supra*, was inapplicable because, *inter alia*, it dealt with state action. 254 U. S., at 299. More recent cases discussing or applying the right to interstate travel have always been in the context of

² For a discussion of the deportations, see The President's Mediation Comm'n, Report on the Bisbee Deportations (November 6, 1917).

oppressive state action. See, e. g., *Edwards v. California*, 314 U. S. 160, and other cases discussed, *infra*.³

It is accordingly apparent that the right to unimpeded interstate travel, regarded as a privilege and immunity of national citizenship, was historically seen as a method of breaking down state provincialism, and facilitating the creation of a true federal union. In the one case in which a private conspiracy to obstruct such movement was heretofore presented to this Court, the predecessor of the very statute we apply today was held not to encompass such a right.

II.

A second possible constitutional basis for the right to move among the States without interference is the Commerce Clause. When Mr. Justice Washington articulated the right in *Corfield*, it was in the context of a state statute impeding economic activity by outsiders, and he cast his statement in economic terms. 4 Wash. C. C., at 380-381. The two concurring Justices in *Crandall v. Nevada*, *supra*, rested solely on the commerce argument, indicating again the close connection between freedom of commerce and travel as principles of our federal union. In *Edwards v. California*, 314 U. S. 160, the Court held squarely that the right to unimpeded movement of persons is guaranteed against oppressive state legislation by the Commerce Clause, and declared unconstitutional a California statute restricting the entry of indigents into that State.

Application of the Commerce Clause to this area has the advantage of supplying a longer tradition of case-law

³ The Court's reliance on *United States v. Moore*, 129 F. 630, is misplaced. That case held only that it was not a privilege or immunity to organize labor unions. The reference to "the right to pass from one state to any other" was purely incidental dictum.

and more refined principals of adjudication. States do have rights of taxation and quarantine, see *Edwards v. California*, 314 U. S., at 184 (concurring opinion), which must be weighed against the general right of free movement, and Commerce Clause adjudication has traditionally been the means of reconciling these interests. Yet this approach to the right to travel, like that found in the privileges and immunities cases, is concerned with the interrelation of state and federal power, not—with an exception to be dealt with in a moment—with private interference.

The case of *In re Debs*, 158 U. S. 564, may be thought to raise some doubts as to this proposition. There the United States sought to enjoin Debs and members of his union from continuing to obstruct—by means of a strike—interstate commerce and the passage of the mails. The Court held that Congress and the Executive could certainly act to keep the channels of interstate commerce open, and that a court of equity had no less power to enjoin what amounted to a public nuisance. It might be argued that to the extent *Debs* permits the Federal Government to obtain an injunction against the private conspiracy alleged in the present indictment,⁴ the criminal statute should be applicable as well on the ground that the governmental interest in both cases is the same, namely to vindicate the underlying policy of the Commerce Clause. However, § 241 is not directed toward the vindication of governmental interests; it requires a private right under federal law. No such right can be found in *Debs*, which stands simply for the proposition that the Commerce Clause gives the Federal Govern-

⁴ It is not even clear that an equity court would enjoin a conspiracy of the kind alleged here, for traditionally equity will not enjoin a crime. See *Developments in the Law—Injunctions*, 78 Harv. L. Rev. 994, 1013-1018 (1965).

ment standing to sue on a basis similar to that of private individuals under nuisance law. The substantive rights of private persons to enjoin such impediments, of course, devolve from state not federal law; any seemingly inconsistent discussion in *Debs* would appear substantially vitiated by *Erie R. Co. v. Tompkins*, 304 U. S. 64.

I cannot find in any of this past case law any solid support for a conclusion that the Commerce Clause embraces a right to be free from private interference. And the Court's opinion here makes no such suggestion.

III.

One other possible source for the right to travel should be mentioned. Professor Chafee, in his thoughtful study, "Freedom of Movement,"⁵ finds both the privileges and immunities approach and the Commerce Clause approach unsatisfactory. After a thorough review of the history and cases dealing with the question he concludes that this "valuable human right," *id.*, at 209, is best seen in due process terms:

"Already in several decisions the Court has used the Due Process Clause to safeguard the right of the members of any race to reside where they please inside a state, regardless of ordinances and injunctions. Why is not this clause equally available to assure the right to live in any state one desires? And unreasonable restraints by the national government on mobility can be upset by the Due Process Clause in the Fifth Amendment. . . . Thus the 'liberty' of all human beings which cannot be taken away without due process of law includes liberty of speech, press, assembly, religion, and also liberty of movement." *Id.*, at 192-193.

⁵ In *Three Human Rights in the Constitution of 1787*, at 162 (1956).

This due process approach to the right to unimpeded movement has been endorsed by this Court. In *Kent v. Dulles*, 357 U. S. 116, the Court asserted that "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment," *id.*, at 125, citing *Crandall v. Nevada*, *supra*, and *Edwards v. California*, *supra*. It is true that the holding in that case turned essentially on statutory grounds. However, in *Aptheker v. Secretary of State*, 378 U. S. 500, the Court, applying this constitutional doctrine, struck down a federal statute forbidding members of Communist organizations to obtain passports. Both the majority and dissenting opinions affirmed the principle that the right to travel is an aspect of the liberty guaranteed by the Due Process Clause.

Viewing the right to travel in due process terms, of course, would clearly make it inapplicable to the present case, for due process speaks only to governmental action.

IV.

This survey of the various bases for grounding the "right to travel" is conclusive only to the extent of showing that there has never been an acknowledged constitutional right to be free from private interference, and that the right in question has traditionally been seen and applied, whatever the constitutional underpinning asserted, only against governmental impediments. The right involved being as nebulous as it is, however, it is necessary to consider it in terms of policy as well as precedent.

As a general proposition it seems to me very dubious that the Constitution was intended to create certain rights of private individuals as against other private individuals. The Constitutional Convention was called to establish a nation, not to reform the common law. Even the Bill of Rights, designed to protect personal liberties, was directed at rights against governmental authority,

not other individuals. It is true that there are a very narrow range of rights against individuals which have been read into the Constitution. In *Ex parte Yarbrough*, 110 U. S. 651, the Court held that implicit in the Constitution is the right of citizens to be free of private interference in federal elections. *United States v. Classic*, 313 U. S. 299, extended this coverage to primaries. *Logan v. United States*, 144 U. S. 263, applied the predecessor of § 241 to a conspiracy to injure someone in the custody of a United States marshal; the case has been read as dealing with a privilege and immunity of citizenship, but it would seem to have depended as well on extrapolations from statutory provisions providing for supervision of prisoners. The Court in *In re Quarles*, 158 U. S. 532, extending *Logan*, *supra*, declared that there was a right of federal citizenship to inform federal officials of violations of federal law. See also *United States v. Cruikshank*, 92 U. S. 542, 552, which announced in dicta a federal right to assemble to petition the Congress for a redress of grievances.

Whatever the validity of these cases on their own terms, they are hardly persuasive authorities for adding to the collection of privileges and immunities the right to be free of private impediments to travel. The cases just discussed are narrow, and are essentially concerned with the vindication of important relationships with the Federal Government—voting in federal elections, involvement in federal law enforcement, communicating with the Federal Government. The present case stands on a considerably different footing.

It is arguable that the same considerations which led the Court on numerous occasions to find a right of free movement against oppressive state action now justifies a similar result with respect to private impediments. *Crandall v. Nevada*, *supra*, spoke of the need to travel to the capital, to serve and consult with the offices of government. A basic reason for the formation of this

Nation was to facilitate commercial intercourse; intellectual, cultural, scientific, social, and political interests are likewise served by free movement. Surely these interests can be impeded by private vigilantes as well as by state action. Although this argument is not without force, I do not think it is particularly persuasive. There is a difference in power between States and private groups so great that analogies between the two tend to be misleading. If the State obstructs free intercourse of goods, people, or ideas, the bonds of the union are threatened; if a private group effectively stops such communication, there is at most a temporary breakdown of law and order, to be remedied by the exercise of state authority or by appropriate federal legislation.

To decline to find a constitutional right of the nature asserted here does not render the Federal Government helpless. As to interstate commerce by railroads, federal law already provides remedies for "undue or unreasonable prejudice," 24 Stat. 380, as amended, 49 U. S. C. § 3 (1) (1964 ed.), which has been held to apply to racial discrimination. *Henderson v. United States*, 339 U. S. 816. A similar statute applies to motor carriers, 49 Stat. 558, as amended, 49 U. S. C. § 316 (d) (1964 ed.), and to air carriers, 72 Stat. 760, 49 U. S. C. § 1374 (b) (1964 ed.). See *Boynton v. Virginia*, 364 U. S. 454; *Fitzgerald v. Pan American World Airways*, 229 F. 2d 499. The Civil Rights Act of 1964, 78 Stat. 243, deals with other types of obstructions on interstate commerce. Indeed, under the Court's present holding, it is arguable that any conspiracy to discriminate in public accommodations having the effect of impeding interstate commerce could be reached under § 241, unaided by Title II of the Civil Rights Act of 1964. Because Congress has wide authority to legislate in this area, it seems unnecessary—if prudential grounds are of any relevance, see *Baker v. Carr*, 369 U. S. 186, 258-259 (CLARK, J., concurring)—to strain to find a dubious constitutional right.

V.

If I have succeeded in showing anything in this constitutional exercise, it is that until today there was no federal right to be free from private interference with interstate transit, and very little reason for creating one. Although the Court has ostensibly only "discovered" this private right in the Constitution and then applied § 241 mechanically to punish those who conspire to threaten it, it should be recognized that what the Court has in effect done is to use this all-encompassing criminal statute to fashion federal common-law crimes, forbidden to the federal judiciary since the 1812 decision in *United States v. Hudson*, 7 Cranch 32. My Brother DOUGLAS, dissenting in *United States v. Classic*, *supra*, noted well the dangers of the indiscriminate application of the predecessor of § 241: "It is not enough for us to find in the vague penumbra of a statute some offense about which Congress could have legislated, and then to particularize it as a crime because it is highly offensive." 313 U. S., at 331-332.

I do not gainsay that the immunities and commerce provisions of the Constitution leave the way open for the finding of this "private" constitutional right, since they do not speak solely in terms of governmental action. Nevertheless, I think it wrong to sustain a criminal indictment on such an uncertain ground. To do so subjects § 241 to serious challenge on the score of vagueness and serves in effect to place this Court in the position of making criminal law under the name of constitutional interpretation. It is difficult to subdue misgivings about the potentialities of this decision.

I would sustain this aspect of the indictment only on the premise that it sufficiently alleges state interference with interstate travel, and on no other ground.

SUPREME COURT OF THE UNITED STATES

No. 65.—OCTOBER TERM, 1965.

United States, Appellant,	} On Appeal From the United	
v.		States District Court for
Herbert Guest et al.		the Middle District of Georgia.

[March 28, 1966.]

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, concurring in part and dissenting in part.

I join Part I of the Court's opinion. I reach the same result as the Court on that branch of the indictment discussed in Part III of its opinion but for other reasons. See footnote 3, *infra*. And I agree with so much of Part II (page 6 to the top of page 8) as construes 18 U. S. C. § 241 to encompass conspiracies to injure, oppress, threaten or intimidate citizens in the free exercise or enjoyment of Fourteenth Amendment rights and holds that, as so construed, § 241 is not void for indefiniteness. I do not agree, however, with the remainder of Part II (page 8 to the top of page 11), which holds, as I read the opinion, that a conspiracy to interfere with the exercise of the right to equal utilization of state facilities is not, within the meaning of § 241, a conspiracy to interfere with the exercise of a "right . . . secured . . . by the Constitution" unless discriminatory conduct by state officers is involved in the alleged conspiracy.

I.

The second numbered paragraph of the indictment charges that the defendants conspired to injure, oppress, threaten, and intimidate Negro citizens in the free exercise and enjoyment of "[t]he right to equal utilization, without discrimination upon the basis of race,

of public facilities . . . owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof." Appellees contend that as a matter of statutory construction § 241 does not reach such a conspiracy. They argue that a private conspiracy to interfere with the exercise of the right to equal utilization of the state facilities described in that paragraph is not, within the meaning of § 241, a conspiracy to interfere with the exercise of a right "secured" by the Fourteenth Amendment because "there exist no Equal Protection Clause rights against wholly private action."

The Court deals with this contention by seizing upon an allegation in the indictment concerning one of the means employed by the defendants to achieve the object of the conspiracy. The indictment alleges that the object of the conspiracy was to be achieved, in part, "[b]y causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts" The Court reads this allegation as "broad enough to cover a charge of active connivance by agents of the State in the making of the 'false reports,' or other conduct amounting to official discrimination clearly sufficiently to constitute a denial of rights protected by the Equal Protection Clause," and the Court holds that this allegation, so construed, is sufficient to "prevent dismissal of this branch of the indictment."¹ I understand this to mean

¹ As I read the indictment, the allegation regarding the false arrests relates to all the other paragraphs and not merely, as the Court suggests, to the second numbered paragraph of the indictment. See n. 1 in the Court's opinion. Hence, assuming that, as maintained by the Court, the allegation could be construed to encompass discriminatory conduct by state law enforcement officers, it would be a sufficient basis for preventing the dismissal of each of the other paragraphs of the indictment. The right to be free from discriminatory conduct by law enforcement officers while using privately owned places of public accommodation (paragraph one) or while traveling from State to State (paragraphs three and four), or while doing any-

that, no matter how compelling the proofs that private conspirators murdered, assaulted, or intimidated Negroes in order to prevent their use of state facilities, the prosecution under the second numbered paragraph must fail in the absence of proofs of active connivance of law enforcement officers with the private conspirators in causing the false arrests.

Hence, while the order dismissing the second numbered paragraph of the indictment is reversed, severe limitations on the prosecution of that branch of the indictment are implicitly imposed. These limitations could only stem from an acceptance of appellees' contention that, because there exist no Equal Protection Clause rights against wholly private action, a conspiracy of private persons to interfere with the right to equal utilization of state facilities described in the second numbered paragraph is not a conspiracy to interfere with a "right . . . secured . . . by the Constitution" within the meaning of § 241. In other words, in the Court's view the only right referred to in the second numbered paragraph that is, for purposes of § 241, "secured . . . by the Constitution" is a right to be free—when seeking access to state facilities—from discriminatory conduct by state officers or by persons acting in concert with state officers.²

thing else, is unquestionably secured by the Equal Protection Clause. It would therefore be unnecessary to decide whether the right to travel from State to State is itself a right secured by the Constitution or whether paragraph one is defective either because of the absence of an allegation of a racial discriminatory motive or because of the exclusive remedy provision of Civil Rights Act of 1964, § 207 (b), 78 Stat. 245, 42 U. S. C. § 2000a-6 (b) (1964 ed.).

² I see no basis for a reading more consistent with my own view in the isolated statement in the Court's opinion that "the rights under the Equal Protection Clause described by this paragraph [two] of the indictment have been . . . firmly and precisely established by a consistent line of decisions in this Court. . . ."

I cannot agree with that construction of § 241. I am of the opinion that a conspiracy to interfere with the right to equal utilization of state facilities described in the second numbered paragraph of the indictment is a conspiracy to interfere with a "right . . . secured . . . by the Constitution" within the meaning of § 241—without regard to whether state officers participated in the alleged conspiracy. I believe that § 241 reaches such a private conspiracy, not because the Fourteenth Amendment of its own force prohibits such a conspiracy, but because § 241, as an exercise of congressional power under § 5 of that Amendment, prohibits *all* conspiracies to interfere with the exercise of a "right . . . secured . . . by the Constitution" and because the right to equal utilization of state facilities is a "right . . . secured . . . by the Constitution" within the meaning of that phrase as used in § 241.³

My difference with the Court stems from its construction of the term "secured" as used in § 241 in the phrase "a right . . . secured . . . by the Constitution or laws of the United States." The Court tacitly construes the term "secured" so as to restrict the coverage of § 241 to those rights that are "fully protected" by the Constitution or another federal law. Unless private interferences with the exercise of the right in question are prohibited by the Constitution itself or another federal law, the right cannot, in the Court's view, be deemed "secured . . . by the Constitution or laws of the United States" so as to make § 241 applicable to a private conspiracy to interfere with the exercise of that right. The Court then

³ Similarly, I believe that § 241 reaches a private conspiracy to interfere with the right to travel from State to State. I therefore need not reach the question whether the Constitution of its own force prohibits private interferences with that right; for I construe § 241 to prohibit such interferences, and as so construed I am of the opinion that § 241 is a valid exercise of congressional power.

premises that neither the Fourteenth Amendment nor any other federal law⁴ prohibits private interferences with the exercise of the right to equal utilization of state facilities.

In my view, however, a right can be deemed "secured . . . by the Constitution or laws of the United States," within the meaning of § 241, even though only governmental interferences with the exercise of the right are prohibited by the Constitution itself (or another federal law). The term "secured" means "created by, arising under or dependent upon," *Logan v. United States*, 144 U. S. 263, 293, rather than "fully protected." A right is "secured . . . by the Constitution" within the meaning of § 241 if it emanates from the Constitution, if it finds its source in the Constitution. Section 241 must thus be viewed, in this context, as an exercise of congressional power to amplify prohibitions of the Constitution addressed, as is invariably the case, to government officers; contrary to the view of the Court, I

⁴ This premise is questionable. Title III of the Civil Rights Act of 1964, 78 Stat. 246, 42 U. S. C. § 2000b (1964 ed.) authorizes the Attorney General on complaint from an individual that he is "being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision," to commence a civil action "for such relief as may be appropriate" and against such parties as are "necessary to the grant of effective relief." Arguably this would authorize relief against private parties not acting in concert with state officers. (This title of the Act does not have an exclusive remedy similar to § 207 (b) of Title II, 42 U. S. C. § 2000a-6 (b).)

The Court affirmatively disclaims any intention to deal with Title III of the Civil Rights Act of 1964 in connection with the second numbered paragraph of the indictment. But, as the District Judge observed in his opinion, the Government maintained that the right described in that paragraph was "secured" by the Fourteenth Amendment and, "additionally," by Title III of the Civil Rights Act of 1964. 246 F. Supp., at 484. That position was not effectively abandoned in this Court.

think we are dealing here with a statute that seeks to implement the Constitution, not with the "bare terms" of the Constitution. Section 241 is not confined to protecting rights against private conspiracies that the Constitution or another federal law also protects against private interferences. No such duplicative function was envisioned in its enactment. See Appendix in *United States v. Price*, ante. Nor has this Court construed § 241 in such a restrictive manner in other contexts. Many of the rights that have been held to be encompassed within § 241 are not additionally the subject of protection of specific federal legislation or of any provision of the Constitution addressed to private individuals. For example, the prohibitions and remedies of § 241 have been declared to apply, without regard to whether the alleged violator was a government officer, to interferences with the right to vote in a federal election, *Ex parte Yarbrough*, 110 U. S. 651, or primary, *United States v. Classic*, 313 U. S. 299; the right to discuss public affairs or petition for redress of grievances, *United States v. Cruikshank*, 92 U. S. 542, 552, cf. *Hague v. CIO*, 307 U. S. 496, 512-513 (opinion of Roberts, J.); *Collins v. Hardyman*, 341 U. S. 651, 663 (dissenting opinion); the right to be protected against violence while in the lawful custody of a federal officer, *Logan v. United States*, 144 U. S. 263; and the right to inform of violations of federal law, *In re Quarles and Butler*, 158 U. S. 532. The full import of our decision in *United States v. Price*, ante, is to treat the rights purportedly arising from the Fourteenth Amendment in parity with those rights just enumerated, arising from other constitutional provisions. The reach of § 241 should not vary with the particular constitutional provision that is the source of the right. For purposes of applying § 241 to a private conspiracy, the standard used to determine whether, for example, the right to discuss public affairs or the right to vote in a

federal election is a "right . . . secured . . . by the Constitution" is the very same standard to be used to determine whether the right to equal utilization of state facilities is a "right . . . secured . . . by the Constitution."

For me, the right to use state facilities without discrimination on the basis of race is, within the meaning of § 241, a right created by, arising under and dependent upon the Fourteenth Amendment and hence is a right "secured" by that Amendment. It finds its source in that Amendment. As recognized in *Strauder v. West Virginia*, 100 U. S. 303, 310, "The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights" The Fourteenth Amendment commands the State to provide the members of all races with equal access to the public facilities it owns or manages, and the right of a citizen to use those facilities without discrimination on the basis of race is a basic corollary of this command. Cf. *Brewer v. Hoxie School District No. 46*, 238 F. 2d 91 (C. A. 8th Cir. 1956). Whatever may be the status of the right to equal utilization of *privately owned facilities*, see generally *Bell v. Maryland*, 378 U. S. 226, it must be emphasized that we are here concerned with the right to equal utilization of *public facilities owned or operated by or on behalf of the State*. To deny the existence of this right or its constitutional stature is to deny the history of the last decade, or to ignore the role of federal power, predicated on the Fourteenth Amendment, in obtaining nondiscriminatory access to such facilities. It is to do violence to the common understanding, an understanding that found expression in Titles III and IV of the Civil Rights Act of 1964, 78 Stat. 246, 42 U. S. C. §§ 2000b, 2000c (1964 ed.), dealing with state facilities. Those provi-

sions reflect the view that the Fourteenth Amendment creates the right to equal utilization of state facilities. Congress did not preface those titles with a provision comparable to that in Title II⁵ explicitly creating the right to equal utilization of certain privately owned facilities; Congress rightly assumed that a specific legislative declaration of the right was unnecessary, that the right arose from the Fourteenth Amendment itself.

In reversing the District Court's dismissal of the second numbered paragraph, I would therefore hold that proof at the trial of the conspiracy charged to the defendants in that paragraph will establish a violation of § 241 without regard to whether there are also proofs that state law enforcement officers actively connived in causing the arrests of Negroes by means of false reports.

II.

My view as to the scope of § 241 requires that I reach the question of constitutional power—whether § 241 or legislation indubitably designed to punish entirely private conspiracies to interfere with the exercise of Fourteenth Amendment rights constitutes a permissible exercise of the power granted to Congress by § 5 of the Fourteenth Amendment “to enforce, by appropriate legislation, the provisions of” the Amendment.

A majority of the members of the Court⁶ express the view today that § 5 empowers Congress to enact laws

⁵ “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.” 42 U. S. C. § 2000a (a) (1964 ed.).

⁶ The majority consists of the Justices joining my Brother CLARK's opinion and the Justices joining this opinion. The opinion of MR. JUSTICE STEWART construes § 241 as applied to the second numbered paragraph to require proof of active participation by state officers

punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy. Although the Fourteenth Amendment itself, according to established doctrine, "speaks to the State or to those acting under the color of its authority," legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, § 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection. It made that determination in enacting § 241, see the Appendix in *United States v. Price*, *ante*, and, therefore § 241 is constitutional legislation as applied to reach the private conspiracy alleged in the second numbered paragraph of the indictment.

I acknowledge that some of the decisions of this Court, most notably an aspect of the *Civil Rights Cases*, 109 U. S. 3, 11, have declared that Congress' power under § 5 is confined to the adoption of "appropriate legislation for correcting the effects of . . . prohibited State laws, and State acts, and thus to render them effectually null, void, and innocuous." I do not accept—and a majority of the Court today rejects—this interpretation of § 5. It reduces the legislative power to enforce the provisions of the Amendment to that of the judiciary;⁷ and it

in the alleged conspiracy and that opinion does not purport to deal with this question.

⁷ Congress, not the judiciary, was viewed as the more likely agency to implement fully the guarantees of equality, and thus it could be presumed the primary purpose of the Amendments was to augment

attributes a far too limited objective to the Amendment's sponsors.⁸ Moreover, the language of § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment are virtually the same, and we recently held in *South Carolina v. Katzenbach*, 383 U. S. —, —, that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." The classic formulation of that test by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 421, was there adopted:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."

It seems to me that this is also the standard that defines the scope of congressional authority under § 5 of the Fourteenth Amendment. Indeed, *South Carolina v. Katzenbach* approvingly refers to *Ex parte Virginia*, 100 U. S. 339, 345-346, a case involving the exercise of the congressional power under § 5 of the Fourteenth

the power of Congress, not the judiciary. See James, *The Framing of the Fourteenth Amendment*, 184 (1956); Harris, *The Quest for Equality*, 53-54 (1960); Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 *Yale L. J.* 1353, 1356 (1964).

⁸ As the first-Mr. Justice Harlan said in dissent in the *Civil Rights Cases*, 109 U. S., at 54: "It was perfectly well known that the great danger to equal enjoyment by citizens of the rights, as citizens, was to be apprehended not altogether from unfriendly State legislation, but from the hostile action of corporations and individuals in the States. And it is to be presumed that it was intended, by that section [§ 5], to clothe Congress with power and authority to meet that danger." See *United States v. Price*, ante, p. —, and Appendix.

Amendment, as adopting the *McCulloch v. Maryland* formulation for "each of the Civil War Amendments."

Viewed in its proper perspective, § 5 appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens. No one would deny that Congress could enact legislation directing state officials to provide Negroes with equal access to state schools, parks and other facilities owned or operated by the State. Nor could it be denied that Congress has the power to punish state officers who, in excess of their authority and in violation of state law, conspire to threaten, harass and murder Negroes for attempting to use these facilities.* And I can find no principle of federalism nor word of the Constitution that denies Congress power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals—neither state officers nor acting in concert with state officers—who engage in the same brutal conduct for the same misguided purpose.¹⁰

III.

Section 241 is certainly not model legislation for punishing private conspiracies to interfere with the exercise of the right of equal utilization of state facilities.

* *United States v. Price*, ante. See *Screws v. United States*, 325 U. S. 91; *Williams v. United States*, 341 U. S. 97; *Monroe v. Pape*, 365 U. S. 167.

¹⁰ Cf. *Atlanta Motel v. United States*, 379 U. S. 241, 258, applying the settled principle expressed in *United States v. Darby*, 312 U. S. 100, 118, that the power of Congress over interstate commerce "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end"

It deals in only general language "with Federal rights and with all Federal rights" and protects them "in the lump," *United States v. Mosely*, 238 U. S. 383, 387; it protects in most general terms "any right or privilege secured . . . by the Constitution or laws of the United States." Congress has left it to the courts to mark the bounds of those words, to determine on a case-by-case basis whether the right purportedly threatened is a federal right. That determination may occur after the conduct charged has taken place or it may not have been anticipated in prior decisions; "a penumbra of rights may be involved, which none can know until decision has been made and infraction may occur before it is had."¹¹ Reliance on such wording plainly brings § 241 close to the danger line of being void for vagueness.

But, as the Court holds, a stringent scienter requirement saves § 241 from condemnation as a criminal statute failing to provide adequate notice of the proscribed conduct.¹² The gravamen of the offense is conspiracy, and therefore, like a statute making certain conduct criminal only if it is done "willfully," § 241 requires proof of a specific intent for conviction. We have construed § 241 to require proof that the persons charged conspired to act in defiance, or in reckless disregard, of an announced rule making the federal right specific and definite. *United States v. Williams*, 341 U. S. 70, 93-95 (opinion of DOUGLAS, J.); *Screws v. United States*, 325 U. S. 91, 101-107 (opinion of DOUGLAS, J.) (involving the predecessor to

¹¹ Mr. Justice Rutledge in *Screws v. United States*, 325 U. S., at 130.

¹² *Ante*, pp. 7-8. See generally, *Boyce Motor Lines, Inc. v. United States*, 342 U. S. 337, 342; *American Communications Assn. v. Douds*, 339 U. S. 382, 412-413; *United States v. Ragen*, 314 U. S. 513, 524; *Gorin v. United States*, 312 U. S. 19, 27-28; *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 501-503; *Omaechevarria v. Idaho*, 246 U. S. 343, 348.

18 U. S. C. § 242). Since this case reaches us on the pleadings, there is no occasion to decide now whether the Government will be able on trial to sustain the burden of proving the requisite specific intent *vis-à-vis* the right to travel freely from State to State or the right to equal utilization of state facilities. Compare *James v. United States*, 366 U. S. 213, 221-222 (opinion of WARREN, C. J.). In any event, we may well agree that the necessity to discharge that burden can imperil the effectiveness of § 241 where, as is often the case, the pertinent constitutional right must be implied from a grant of congressional power or a prohibition upon the exercise of governmental power. But since the limitation on the statute's effectiveness derives from Congress' failure to define—with any measure of specificity—the rights encompassed, the remedy is for Congress to write a law without this defect. To paraphrase my Brother DOUGLAS' observation in *Screws v. United States*, 325 U. S., at 105, addressed to a companion statute with the same shortcoming, if Congress desires to give the statute more definite scope, it may find ways of doing so.